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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

DOROTHY M. THOMPSON ET AL., PETITIONERS

v.

RALPH E. KENNICKELL, JR., PUBLIC PRINTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether section 302 of the Federal Courts Improvement Act of 1982 eliminated the availability of post-judgment interest in certain classes of cases in which post-judgment interest had traditionally been available against the United States. e.g., plaintiffs suing successfully under the Federal Tort Claims Act. or. alternatively. section 302 expanded the cases in which post-judgment interest is available against the United States to include all district court judgments.

PARTIES TO THE PROCEEDING

Petitioners Dorothy M. Thompson. S. Vera E. Burnette. Melrie H. F. Asquith. Shirley S. Alston and Bertha T. Gaither. are filing this petition for a writ of certiorari on behalf of approximately 375 female Journeyman Bindery Workers of the Government Printing Office. The respondent is the Public Printer of the United States.

TABLE OF CONTENTS

Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement	2
A. Proceedings in Underlying Case	3
B. Proceedings on Claim of Interest	3
Reasons for Granting the Petition	4
A. The Prior Law	7
B. Passage of the 1982 Act	8
C. The 1982 Act	15
D. The Court of Appeals Decision	20
E. Applicable Law	27
Conclusion	31

Appendices

Opinion of Court of Appeals (Appendix A)	1
Opinion of District Court (Appendix B)	26
Current Law (Appendix C)	30
Law Prior to October 1, 1982 (Appendix D)	37
Legislative History (Appendix E)	42
Relevant Docket Entries (Appendix F)	62

TABLE OF AUTHORITIES

Cases

Arvin v. United States. 742 F.2d 1301 (11th Cir. 1984) 6

Baltimore & Phila. Steamboat Co. v. Norton. 284 U.S. 408 (1932) 30

Commissioner v. Engle. 464 U.S. 206 (1984) 22

Director. Office of Workers' Comp. Programs v. Perini North River Assocs.. 459 U.S. 297 (1983) 29

Holly v. Chasen. 639 F.2d 795 (D.C. Cir.). cert. denied. 454 U.S. 822 (1981) 9. 20

International Woodworkers of America. Local 3-98 v. Donovan. 769 F.2d 1388 (9th Cir. 1985) 6

Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd.. 735 F.2d 895 (5th Cir. 1984).. 6

Library of Congress v. Shaw. 92 L.Ed.2d 250 (1986) .. 5. 6. 28

Morton v. Mancari. 417 U.S. 535 (1974) 30

Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana. 86 L.Ed.2d 168 (1985) 30

Tcherepnin v. Knight. 389 U.S. 332 (1967) 30

United States v. Universal C.I.T. Credit Corp.. 344 U.S. 218 (1952) 21

Statutes

26 U.S.C. sec. 6621 (1984) 12. 17. 23. 26

26 U.S.C. sec. 7405 23

28 U.S.C. sec. 1254 (1984) 2

28 U.S.C. sec. 1346 (1984) 5. 23

28 U.S.C. sec. 1346 (1982) 7

28 U.S.C. sec. 1961 (1982) ..... passim

28 U.S.C. sec. 1961 (1984) ..... passim

28 U.S.C. sec. 2411 (1982) 7. 8. 17. 18. 19

28 U.S.C. sec. 2411 (1984) 17. 23

28 U.S.C. sec. 2412 (1985) 22. 26

28 U.S.C. sec. 2516 (1982) 8

28 U.S.C. sec. 2516 (1984) 16. 22

31 U.S.C. sec. 724a (1982) 7. 19

31 U.S.C. sec. 1304 (1984) 16. 19

Other Authorities

S. 1477. 96th Cong.. 1st Sess. 8. 9

S. 1700. 97th Cong.. 1st Sess. ..... passim

H.R. 4482. 97th Cong.. 1st Sess. 15

Pub. L. No. 97-177. 96 Stat. 85 (1982) 9

127 Cong. Rec. S. 14683-701 ..... 10. 11. 14
(daily ed. Dec. 8. 1981) 10

130 Cong. Rec. H. 12292-93
(daily ed. Nov. 14. 1984)..... 27

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Dorothy M. Thompson. S. Vera E. Burnette. Melrie H. F. Aisquith. Shirley S. Alston and Bertha T. Gaither. on behalf of a class of approximately 375 female Journeyman Bindery Worker employees in the Government Printing Office (hereinafter "GPO"). petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (Appendix A) and the district court (Appendix B) in this case are unreported. The opinion of the court of appeals on the merits of the case is reported at 678 F.2d 257. The decisions of the district court on the merits of the case are reported at 499 F. Supp. 1147. 1167.

JURISDICTION

The judgment of the court of appeals was entered on August 8. 1986. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

STATUTES INVOLVED

This petition involves the interpretation of 28 U.S.C. sec. 1961 (1984). which was amended by the Federal Courts Improvement Act of 1982. The relevant provisions of the prior law are reprinted in Appendix C while the relevant provisions of current law are printed in Appendix D.

STATEMENT

This petition seeks review of a decision of the United States Court of Appeals for the District of Columbia

Circuit denying all post-judgment interest to petitioners, some 375 female employees of the GPO.

A. Proceedings in Underlying Case

Petitioners brought the underlying class action against the Public Printer on May 25, 1973, alleging, principally, violations of Title VII of the Civil Rights Act of 1964, as amended, and the Equal Pay Act of 1963, as amended. The district court on October 1, 1979, and on May 20, 1980, respectively, entered its liability and relief orders granting extensive monetary and injunctive relief to petitioners. On April 27, 1982, the court of appeals affirmed the decision of the district court in almost all respects. Thereafter, GPO proceeded to compute amounts due petitioners, making payments on its back-pay obligation starting in late 1982 and continuing into 1984.

B. Proceedings on Claim of Interest

In all executed Satisfactions of Judgment, petitioners reserved their claim for post-judgment interest. When GPO refused to pay any post-judgment interest, petitioners filed a motion in the district court, which motion was denied on September 7, 1984. Petitioners

appealed to the court of appeals which, on August 8, 1986, affirmed the district court.

In sum, petitioners argued below that section 302 of the Federal Courts Improvement Act of 1982 (hereinafter sometimes referred to as the "1982 Act"), which amended, inter alia, 28 U.S.C. sec. 1961 (1982), constituted a waiver of sovereign immunity with respect to the payment of post-judgment interest on all judgments that are recovered against the United States in federal district courts and are unsuccessfully appealed by the government.

REASONS FOR GRANTING THE PETITION

This case presents major questions concerning the interpretation of a statute and its legislative history that appear to be unique in the law of waiver of sovereign immunity on the award of interest, yet which affect a multitude of claimants.

Ordinarily, the decision on a claim of interest against the United States requires simply an analysis as to whether legislation was sufficiently clear and unambiguous to find the requisite waiver of sovereign immunity to pay interest. Library of Congress v. Shaw, 92 L.Ed.2d 250

(1986). The instant case, however, does not fit into that mold.

In the process of amending a number of statutes relating to awards of post-judgment interest against the United States, Congress repealed, without comment or explanation, provisions that awarded post-judgment interest to successful claimants in important categories of cases, in particular, district court suits under the Federal Tort Claims Act and Tucker Act. 28 U.S.C. sec. 1346(a) (1984). There is now no conceivable statutory basis for awarding interest to a successful plaintiff in a suit brought in the district court under the Federal Tort Claims Act or the Tucker Act, where interest was available prior to the 1982 Act, and not to a successful plaintiff in a suit brought under Title VII of the Civil Rights Act of 1964.

Nothing in the legislative history suggests that Congress was narrowing the availability of post-judgment interest against the United States. Indeed, the contrary is the case. The legislative history shows that Congress intended to place judgments against the United States substantially on a par with those against private parties.

However. to construe the 1982 Act as did the court of appeals would result in a dramatic retrenchment in the award of post-judgment interest. The court of appeals declined to deal with this argument of petitioners (Appendix A at 23-24) despite its centrality to petitioners' position.

By mechanically applying the well-established doctrine most recently enunciated in Library of Congress v. Shaw. the court of appeals below -- and three others circuits that have rendered decision on the issue of post-judgment interest in the past two years[1] -- failed to come to grips with the fact that their decisions have silently eliminated a long-standing. salutory and remedial provision. Given the unanimity in the circuits it is unlikely that there will be any better -- or. possibly. any other -- opportunity to consider the applicability of 28 U.S.C. sec. 1961 (1984) to numerous important classes of cases.

1/ International Woodworkers of America. Local 3-98 v. Donovan. 769 F.2d 1388. 1392 (9th Cir. 1985): Arvin v. United States. 742 F.2d 1301. 1304 (11th Cir. 1984): Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd.. 735 F.2d 895. 902 (5th Cir. 1984). In none of the cases. however. did the plaintiffs present the arguments made by petitioners below and in this Court.

A. The Prior Law

Before its amendment by the 1982 Act. 28 U.S.C. sec. 1961 (1982) provided as follows:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution thereof may be levied by the marshal. in any case where. by the law of the State in which such court is held. execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment. at the rate allowed by state law.

Despite its broad language. section 1961 was held by numerous courts not to apply to suits against the federal government. The rationale for these decisions was (1) that there were specific statutes providing for interest on judgments against the federal government under certain specific circumstances which would be superfluous if section 1961 were read to confer an automatic entitlement to interest on all judgments against the United States.[2]

2/ Specifically. section 2411(a) of Title 28 provided for the payment of interest in tax cases and section 2411(b) of Title 28 expressly provided for the payment of interest on judgments rendered against the United States in suits brought under the jurisdictional provisions of section 1346 of Title 28 (providing in relevant part for jurisdiction over Tucker Act and Federal Tort Claims Act suits against the United States). In addition. section 724a of Title 31. which provided permanent appropriations for the payment of interest on judgments rendered against the United States. expressly limited the payment of such interest to judgments under

and (2) that, particularly since interest was not available against the United States when Congress originally enacted section 1961, neither section 1961 itself nor its legislative history contained an express waiver of sovereign immunity against the imposition of interest on the federal government. See, e.g., Holly v. Chasen, 639 F.2d 795 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981).

B. Passage of the 1982 Act

In both the 96th and 97th Congresses, bills were introduced that provided, inter alia, that both pre- and post-judgment interest was payable on all final judgments against the United States (including judgments of the new Claims Court). S. 1477, 96th Cong., 1st Sess., and S. 1700, 97th Cong., 1st Sess., 127 Cong. Rec. S. 14692. Each of the bills added the following new provisions to section 1961:

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section 2411(b) of Title 28. Finally, section 2516 of Title 28 concerned the payment of interest in United States Claims Court decisions. The law provided for post-judgment interest only if authorized by contract or specific statute or if the government took an unsuccessful appeal from the full Court of Claims to the Supreme Court. In the latter case, the period for interest was also limited from the time the judgment was filed with GAO until the return of the mandate of affirmance. 28 U.S.C. secs. 2516(a) and (b).

> Except as otherwise provided in paragraph (1) of this subsection [dealing with rate of interest payable on tax judgments], interest shall be allowed on all final judgments against the United States (including judgments of the United States Claims Court) . . . .

(Emphasis added.) S. 1477, Part B, sec. 211(a)(2), passed by the Senate on Oct. 30, 1979, and S. 1700, Part B, sec. 302(a)(3), reported favorably by the Senate Committee on the Judiciary on Nov. 18, 1981. (Appendix E at 45.)[3]

As reported out of committee, the above bills made other substantial departures from current law in their provisions for pre-judgment interest and the rate at which interest was to be computed. They also brought within section 1961 judgments in cases against the government governed by various statutes. Finally, as discussed in note 2, supra, the bills repealed a number of statutes.

When S. 1700 was considered by the Senate on December 8, 1981, Senate Grassley, speaking for the

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3/ Such an approach is entirely consistent with actions in the 97th Congress to charge the government interest when it fails to promptly pay its debts, as evidenced by the Prompt Payment Act, Pub. L. No. 97-177, 96 Stat. 85 (1982), which requires federal agencies to pay interest on federal contract debts not satisfied within 15 days after submission.

Administration. offered amendments that had been proposed by the Administration (specifically. the Office of Management and Budget ("OMB")). The amendments contained the language of section 302 substantially as it appears in its final form. 127 Cong. Rec. S14683. 14699 (daily ed. Dec. 8. 1981). (Appendix E at 47-49.)

The concerns to which the amendments were addressed were first raised five days earlier in a letter dated December 3. 1981 from OMB's Director Stockman to Senator Dole (Appendix E at 52-55). In that letter. the OMB Director objected to the interest rate in S. 1700 (which he stated was intended to eliminate any incentive in the current law for frivolous appeals and to provide substantive "even-handedness" between private parties and the United States) from being applied to the government. Next. he requested elimination of the provision in S. 1700 that would have required interest to be paid on all adverse Claims Court judgments and recommended that interest be limited to the date of mandate of affirmance of all appealed Federal Circuit cases. This cut-off date would. according to Mr. Stockman. "conform Claims Court procedures

[regarding the period during which interest would accrue] to those in effect for District Court litigations." Finally, Mr. Stockman sought elimination of that portion of S. 1700 that authorized assessment of pre-judgment interest.

Between December 3 and December 7, 1981, OMB staff personnel met with the Senate Judiciary staff to discuss OMB's concerns. In a letter dated December 7, 1981, to Senator Dole (Appendix E at 55-56), Mr. Stockman outlined his understanding of the agreement reached regarding modifications to S. 1700 to satisfy his concerns:

(1) use of a rate of post-judgment interest equal to the rate paid by the government on one-year Treasury bills, which rate, "shall be applicable to all litigants, except, as noted below, those in internal revenue tax cases";

(2) maintenance of the status quo in Claims Court cases, in that except in tax cases interest would accrue only during the pendency of appeals from the new Court of Appeals for the Federal Circuit and then only until a mandate of affirmative is issued; and

(3) elimination of pre-judgment interest.

Finally. Mr. Stockman stated that he understood his letters of December 3 and 7 were to be inserted into the Congressional Record and made a part of S. 1700's legislative history. At no time did Mr. Stockman allude to any possible changes in S. 1700 relating to the classes of cases in the district courts in which post-judgment interest would be available.

Senator Grassley. in offering the agreed upon amendments. stated that the "crux of the issue" related to the computation of the rate of post-judgment interest to be paid by the government and made no reference to the coverage of the post-judgment interest provision. except insofar as it related to the Claims Court. He identified the purposes of the amendments:

(1) to amend new section 1961(a) to provide that post-judgment interest should be computed at the annual average Treasury Bill rate applicable immediately before entry of the judgment rather than the usually higher rate applicable to tax judgments established under section 6621 of the Code:

(2) to eliminate the provision for payment of interest on final judgments against the United States in the new Claims Court, which under the new law would render final judgments, and substitute therefor a provision for interest only on judgments of the new Court of Appeals for the Federal Circuit which are appealed, and only from the date of filing of the transcript with GAO to the date of the mandate of affirmance; and

(3) to eliminate the provision for pre-judgment interest.

Senator Grassley explained the proposed changes in the obligation of the federal government to pay interest in the following terms:

> [U]nder existing structure of the U.S. Court of Claims, determination [sic] of the trial commissioners, when appealed to the full Court of Claims, do not draw interest until a final determination is made by the Court of Claims. Under the committee bill the new U.S. Claims Court, which replaces the trial division of the existing Court of Claims, would render final judgments.
>
> These judgments would have been subject to interest unless otherwise provided for. The second change made by this amendment accomplishes that purpose.

> Thus, interest would accumulate only from the date of final judgment by the U.S. Court of Appeals for the Federal Circuit. Although the new Claims Court would be placed in the unique position that does not apply to the judgments of the several district courts, the amendment does retain the status quo with respect to accumulation of interest on judgments of the Court of Claims.

127 Cong. Rec. S14699 (daily ed. Dec. 8, 1981).

(Appendix E at 50-51.) (Emphasis added.)

When questioned by Senator Leahy, another member of the Senate Judiciary Committee, as to why OMB was seeking a substantial change in the bill so tardily, Senator Grassley apologized and then stated:

> . . . I think that the rationale behind it is reasonable and that we ought to move forward with it. We have done it in a manner so that it is not far out of line as to cause any particular harm.
>
> It is related to a rate of interest that is reasonable and a yardstick which has been used on similar occasions in the past.

(Id. at 58-59.) (Emphasis added.)

Senator Leahy responded: "I accept the explanation of my distinguished colleague from Iowa as to the reason for the amendment." (Id.)

S. 1700, as amended by the OMB proposal, was considered and adopted by the House of Representatives as

an amendment to H.R. 4482 on March 9. 1982. The House followed the lead of the Senate and there was no legislative history in the House on section 302. The Senate approved section 302 as amended by the OMB proposal and the bill was enacted into law on April 2. 1982.

There was no suggestion in any of the legislative history that the OMB amendments eliminated the payment of post-judgment interest for the newly added classes of successful plaintiffs. much less that it removed the long-standing right of FTCA plaintiffs to receive post-judgment interest. To the contrary. as noted above. Senator Grassley stated that a specific provision was included to deny interest to judgments of the new Claims Court. a provision that meant that judgments of the Claims Court. in which the United States is always a defendant. would be in a "unique position" and different from "the judgments of the several district courts." (See pages 13-14. supra.)

C. The 1982 Act

In the form in which the 1982 Act was modified to accommodate OMB's concerns. the provision in S. 1700. that "interest shall be allowed on all judgments against the

United States" (see pages 8-9. supra). was omitted without any indication that the post-judgment interest provision was being modified. The other amendments to section 1961 and other statutes. along with the legislative history. demonstrate that Congress intended to pass a law that included the payment of post-judgment interest on all district court judgments against the United States. Although section 1961(a) as amended does not expressly refer to cases in which the federal government is a defendant as instances in which interest is payable. the following changes in section 1961 and conforming changes in related statutes. particularly when read in the light of the legislative history. make it unmistakable that such cases are now included within new section 1961(a):

(1) New section 1961(b) states that post-judgment interest shall be computed daily from the date of judgment to the day of payment. except as provided in 28 U.S.C. sec. 2516(b) (Federal Circuit cases) and 31 U.S.C. sec. 1304(b) (judgments against the United States payable out of the Government Accounting Office (hereinafter "GAO") appropriations fund). Under these two statutes. interest is

paid only from the date of filing of the transcript of the judgment with GAO to the date of the mandate of affirmance. that is. only in those cases which the government appeals and loses and only during such appeal time. If section 1961(a) does not apply to the federal government. it would have been unnecessary to incorporate the computation date exceptions in these statutes in section 1961(b).

(2) New section 1961(c)(1) provides that section 1961(a) shall not apply to any judgment of any court with respect to any internal revenue tax case (i.e.. in suits by taxpayers to obtain refunds of overpaid taxes. the only tax cases that can be brought in the district courts). Interest on tax refund claims remains allowable under new 28 U.S.C. sec. 2411 (1984) (formerly 28 U.S.C. sec. 2411(a) (1982)) and is payable at the rate established under 26 U.S.C. sec. 6621 (1984). If new section 1961(a) does not on its face apply to all district court cases in which the federal government is a defendant. this exception in new section 1961(c)(1) is superfluous.

(3) New section 1961(c)(2) provides for post-judgment interest at the rate and in the manner provided in new sections 1961(a) and (b) on all final judgments (except tax cases, which as indicated in (2), have their own special rule) against the United States in the new Court of Appeals for the Federal Circuit. This broad interest provision, which requires the government to pay interest in all appealed Federal Circuit cases, parallels the expanded provision for interest on all district court judgments now contained in new section 1961(a).

(4) Inasmuch as the amendments to section 1961 rendered superfluous section 2411(b) of Title 28 (which provided for post-judgment interest in all cases arising under 28 U.S.C. sec. 1346 (1982) in which the government is a defendant), section 2411(b) was repealed by section 302. Thus, the 99-year-old provision previously providing for post-judgment interest in certain cases was eliminated.[4]

4/ Holly v. Chasen, supra, 639 F.2d at 795. It is highly significant that government counsel acknowledged at oral argument in the court of appeals that the government was continuing to pay interest on FTCA judgments. He could cite no statutory authority for that practice.

(5) Finally. 31 U.S.C. sec. 1304 (1984) (formerly 31 U.S.C. sec. 724a (1982) -- see note 2. supra). which provides for payments of judgments against the federal government out of the GAO appropriations fund (and from which most of petitioner' judgments have been and are being paid). was amended to eliminate the reference to the time limitation on any interest payable by the federal government under 28 U.S.C. sec. 2411(b) (1982) and to make the limitations of section 1304 apply to interest payable on all judgments paid from the GAO appropriations fund.

The above statutory amendments to section 1961 and related sections make clear that section 1961(a) now requires the payment of post-judgment interest on all appealed judgments against the federal government in district courts. Any other interpretation renders superfluous most of the above-discussed amendments to section 1961 and eliminates almost entirely those instances in which interest on judgments is payable by the federal government on district court judgments (since 28 U.S.C. sec. 2411(b) has been repealed). There is no evidence that

Congress intended such an extensive cutback on interest payable by the federal government. On the contrary, as indicated in Section B. supra. it is clear that the legislative change was intended to provide uniformity and "even-handedness" between private litigants and the government in the payment of interest on judgments.

D. The Court of Appeals Decision

The decision of the court of appeals below was the first one to treat in detail the arguments which petitioners have made in the instant case. Petitioners submit that the court of appeals erred in its analysis.

Initially, the court construed petitioners' arguments in support of their position as "independent arguments" (Appendix A at 10) rather than as cumulatively pointing to petitioners' position as the best and most reasonable reading of congressional intent. The court of appeals violated the precept: "Our duty then is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'" Commissioner v. Engle, 464 U.S. 206, 217

(1984). "[W]e may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that expresses the purpose of Congress." United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952).

There are other errors in the opinion of the court of appeals:

(1) The court of appeals asserted that

> Section 1961(b) does not state that interest under section 1961(a) shall be computed daily except as provided in 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b). Section 1961(b) does not explicitly restrict itself to payments of post-judgment interest under section 1961(a) but rather sets out the time period during which post-judgment interest runs, regardless of the statutory source of the duty to pay such interest.

(Appendix A at 13.) (Emphasis in original.) (Footnote omitted.) In "explaining away" or interpreting section 1961(b) in a manner consistent with its decision, the court of appeals violated one of the canons of statutory construction which it purported to follow, that is, that a court should not give a broader reading to a statute than required. More important, the court of appeals erred in its analysis because, contrary to its statement (Appendix A at

13. note 2). there were no other statutes in 1982 providing generally for interest on judgments against the United States. Of the two statutes cited by the court of appeals. one (28 U.S.C. sec. 2516(b) (1984)) is itself a limitation on section 1961(a). as indicated in section 1961(b). and does not independently provide for payment of post-judgment interest. The other statute cited. 28 U.S.C. sec. 2412(f). was not enacted until 1985 and itself refers to section 1961(b). which strongly suggests that section 1961(b) is not to be relied on in other statutes absent a specific incorporation into that section.[5]

(2) The court of appeals erred in its analysis of section 1961(c)(1) in responding to petitioners' position that that section would be superfluous unless section 1961(a) applies to appealed district court judgments rendered against the United States. The court of appeals assumed that suits for underpayments of tax are held in the

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5/ Moreover. the broad language used by Senator Grassley -- "the new Claims Court would be placed in the unique position that does not apply to the judgments of the several district courts" (Appendix A at 19-20) -- is hardly consonant with the paucity of situations in which interest is available against the government in the district courts under the court of appeals' reading of section 1961.

district court. Such suits proceed in the Tax Court. Except in limited situations (suits for erroneous refunds), the only instances in which a taxpayer is in a district court regarding the payment of money in a tax dispute is when he is claiming a refund. E.g., 28 U.S.C. sec. 1346; 26 U.S.C. sec. 7405. In such suits, it is the United States, not the taxpayer, that owes interest. The court of appeals' other attempts to explain the necessity for section 1961(c)(1), if section 1961(a) is inapplicable to the federal government, are redundant (e.g., necessity to exclude the timing provisions of section 1961(b)) or otherwise unpersuasive (e.g., section 1961(c)(1) is necessary to exempt tax cases from section (c)(2), whereas a reference to section 2411 and/or 26 U.S.C. sec. 6621 would more easily serve that result).

(3) The court of appeals also relied on the point that accepting petitioners' argument would result in "contradictory directives" concerning the period which for interest would be payable. (Appendix A at 15, note 4.) However, as the court of appeals itself recognized elsewhere in its opinion, the "contrary directives" existed in

the law prior to 1982. (Id. at 7). They merely continued after passage of the 1982 Act.

(4) The court of appeals stated that it is impossible to attribute to the House of Representatives the understanding of the purposes of the OMB amendments held by the Senate. (Appendix A at 18.) However, one may not base a construction of a statute on the assumption that the House, which relied solely on the Senate for the bill and which had no legislative history of its own, was ignorant of the circumstances under which the bill developed in and was passed by the Senate and, therefore, did not share the Senate's knowledge of the bill's legislative history.

(5) The court of appeals, while relying heavily on the presumption that Congress understood the meaning of the bill it passed (Appendix A at 18), was required by its position to engage in the completely unreasonable assumption that neither Senator Dole, one of the authors of the bill, nor the Senate Judiciary Committee understood that the unambiguous waiver of sovereign immunity, which

was contained in the bill as originally offered and reported. would accomplish precisely that. (Id. at 21 & n. 5.)[6]

(6) The court of appeals relied on the point that the Senate Report described S. 1700 "only as a consolidation." (Id. at 21.) However, the Report did not use the word "only." Moreover, given the addition of pre-judgment interest and other conceded major changes in the law in S. 1700 as reported out by the Senate Judiciary Committee, it is clear that the use of the word "consolidation" was not intended to describe the entire scope of S. 1700.

(7) The court of appeals stated that a "significant indicator" that the Senate did not contemplate expanding instances in which interest was payable against the federal government was that the Congressional Budget Office estimated the cost of the bill as de minimis (less than $70,000) and did not include an estimate of the cost of the

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6/ The bill that was reported out by the Judiciary Committee in 1982 had been passed by the Senate two years earlier. (See page 9, supra.) This fact makes all the more unreasonable the speculation on the part of the court of appeals that the Senate did not understand that the bill reported out of committee would have expanded the liability of the government for post-judgment interest. (Appendix A at 20-21.)

waiver of post-judgment interest in some cases. This reasoning is highly unpersuasive because the $70.000 estimated cost also did not include an estimate of the cost of expanding the rate of interest in section 1961 from the statutory state rate (an average of 4 per cent) to the Treasury bill rate. OMB Director Stockman in December 1981. when objecting to use of the rate provided for in 26 U.S.C. sec. 6621 and proposing the one-year Treasury bill rate (both of which at the time were substantially higher than the 4 per cent state rate). asserted that no definitive study of the interest provisions of S. 1700 had been made. but that their best estimate was that the cost would be substantial. (Appendix E at 52.) Finally. the fact that the Senate Report section on "Changes in Existing Law" contains no reference to the increase in interest rates or expansion of those entitled thereto is. in view of the other indications of congressional intent. of minor import to the appropriate statutory interpretation in this case.

(8) The court of appeals relied upon the enactment of 28 U.S.C. sec. 2412(f).

> which provides for the payment of post-judgment interest when the United States appeals an award of

> costs or attorneys' fees awarded under the Equal Access to Justice Act. See Pub. L. No. 99-80. { 2(e), 99 Stat. 183. 185-86 (1985). If interest on such district court judgments had already been available under 28 U.S.C. { 1961(a). the addition of subsection (f) to 28 U.S.C. { 2412 would have been superfluous.

(Appendix A at 25.) This statute is not superfluous. however. because it applies to fee awards in all courts. not just federal district courts. It is petitioners' position that this 1985 statute evidences a further waiver of sovereign immunity and supports their reading of section 1961(a) enacted in 1982. Congress went to great steps to have parity in the rate and time of payment of post-judgment interest on EAJA awards and those in federal district court judgments against the United States. 130 Cong. Rec. H. 12292-93 (daily ed. Nov. 14. 1984).

E. Applicable Law

This case requires the courts to answer the question of what the Federal Courts Improvement Act of 1982 accomplished. While it is tempting to consider petitioners' claim in a vacuum -- a temptation to which the court of appeals succumbed -- petitioners contend that that is not the appropriate method of analysis. The instant case.

petitioners submit. cannot be viewed. as the court of appeals viewed it. as on all fours with Library of Congress v. Shaw. namely. as raising the simple question of whether the alleged waiver of immunity contained in the 1982 Act was sufficiently explicit and unambiguous. If it is viewed in that light. there would be little reason for this Court to grant the writ.

The decisions of the court of appeals below and of the other circuits that have ruled on the question create an unappreciated head-on collision with other tenets of statutory construction and considerations of public policy. Since there is no conceivable way in which the relevant statutes can support an award of post-judgment interest to Federal Tort Claims Act or district court Tucker Act plaintiffs unless interest is also payable to petitioners. acceptance of these decisions would require the unreasonable conclusion that Congress. silently and without evident consideration to the question. repealed the long-standing and salutory provision awarding interest to district court FTCA and Tucker Act plaintiffs. But there is no evidence of "any congressional intent to withdraw

coverage" of the post-judgment interest provisions from those successful plaintiffs. Director, Office of Workers' Comp. Programs v. Perini North River Assocs., 459 U.S. 297, 315-16 (1983) (construing Longshoremen's and Harbor Workers' Compensation Act). Furthermore, remedial statutes such as the LHWCA and other laws that compensate citizens for unjustified losses "are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results." Baltimore & Phila. Steamboat Co. v. Norton, 284 U.S. 408, 414 (1932); see also, e.g., Morton v. Mancari, 417 U.S. 535, 549-50 (1974) ("repeals by implication are not favored"); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (remedial statutes are construed broadly to effectuate their purposes). In addition, as noted in Section C, supra, acceptance of the decision below would, contrary to established principles of statutory construction, render several portions of the 1982 Act superfluous. See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 86 L.Ed.2d 168, 179 (1985)

(referring to "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

Petitioners submit that it is not appropriate to take the approach of the court of appeals below, namely, to defer the question of the availability of post-judgment interest to FTCA and district court Tucker Act plaintiffs to the day when those plaintiffs come before it:

First, the day is unlikely to come. The government is paying post-judgment interest to those plaintiffs when they are successful and there may be no one with standing who can (or would want to) challenge those payments.

Second, petitioners' right to receive post-judgement interest is precisely the same as those plaintiffs' right, since the right of each group turns on the single and indivisible meaning of the 1982 Act.

The correct reading of the Federal Courts Improvement Act of 1982 requires the conclusion that petitioners are entitled to post-judgment interest.

CONCLUSION

For the reasons stated. the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5821

DOROTHY M. THOMPSON, et al., APPELLANTS

v.

RALPH E. KENNICKELL, JR., PUBLIC PRINTER

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 74-01101)

Argued April 3, 1986

Decided August 8, 1986

Nora A. Bailey, with whom *David M. Dorsen* and *Roderic V.O. Boggs* were on the brief for appellants.

Robert C. Seldon, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, *Royce C. Lamberth* and *R. Craig Lawrence*, Assistant United States Attorneys, were on the brief for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD, *Chief Judge*, BORK and SILBERMAN, *Circuit Judges.*

Opinion for the Court filed by *Chief Judge* WALD.

WALD, *Chief Judge*: The sole issue presented in this appeal is whether 28 U.S.C. § 1961(a) requires the United States to pay post-judgment interest whenever it unsuccessfully appeals a money judgment rendered against it in a civil action. Appellants Dorothy M. Thompson, S. Vera E. Burnette, Melrie H.F. Aisquith, Shirley S. Alston and Bertha T. Gaither are the named representatives of a class of 324 journeyman bindery workers presently or formerly employed by the Government Printing Office. After successfully prosecuting a sex discrimination suit against the Government Printing Office and defending that judgment on appeal, these appellants moved the District Court for an award of post-judgment interest. Appellants argued that certain amendments to 28 U.S.C. § 1961, enacted as part of the Federal Courts Improvement Act of 1982, entitled them to this award. The District Court denied appellants' motion after concluding that the 1982 amendments to 28 U.S.C. § 1961 did not amount to a clear waiver of sovereign immunity for awards of post-judgment interest. We affirm the District Court.

I. BACKGROUND

A. *The District Court Litigation*

This appeal arises in the aftermath of a complex sex discrimination class action brought by women bindery workers against the Government Printing Office. In 1980, after several years of litigation, the District Court awarded the bindery workers, *inter alia*, front and back pay under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. *See Thompson* v. *Boyle*, 499 F. Supp. 1147 (D.D.C. 1980). This court substantially affirmed

the District Court's judgment. *See Thompson* v. *Sawyer*, 678 F.2d 257 (D.C. Cir. 1982).

On May 17, 1984, appellants moved the District Court under 28 U.S.C. § 1961(a) for an award of post-judgment interest on the sums paid or payable to them in satisfaction of the judgment against the Government Printing Office. Although acknowledging that this court had previously held that the United States had not waived sovereign immunity against such awards of post-judgment interest, *see Holly* v. *Chasen*, 639 F.2d 795 (D.C. Cir.) (per curiam), *cert. denied*, 454 U.S. 822 (1981), appellants argued that intervening statutory changes enacted as part of the Federal Courts Improvement Act of 1982 now authorized the payment of post-judgment interest by the United States on all federal district court judgments unsuccessfully appealed by the United States. *See* Pub. L. No. 97-164, § 302, 96 Stat. 25, 55-56 (1982).

The District Court denied appellants' motion on the ground that it was not authorized to award interest against the United States absent an express waiver of sovereign immunity. According to the District Court, the 1982 amendments to 28 U.S.C. § 1961 were not sufficiently "clear, unambiguous, express or explicit" to warrant any interpretation of the amendments as "a sweeping waiver of the government's traditional right, based on sovereign immunity, to avoid interest on judgments." *Thompson* v. *Barrett*, No. 74-1101, slip op. at 1, 2 (D.D.C. Sept. 7, 1984).

B. *The No-Interest Rule*

Under well-settled principles of sovereign immunity, the United States cannot be sued without its consent. Courts, moreover, must strictly construe the language of purported waivers in favor of the sovereign. "[T]here can be no consent by implication or by use of ambiguous

language." *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947). *See also United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *King*, 395 U.S. 1, 4 (1969).

These principles of sovereign immunity take on added force when applied to claims for interest against the United States. Interest cannot be recovered in a suit against the United States absent an express waiver of sovereign immunity from the award of interest separate from a general waiver of immunity to suit. *See Library of Congress* v. *Shaw*, 54 U.S.L.W. 4951, 4952-53 (U.S. July 1, 1986). This "no-interest rule" harkens back to the days when interest was viewed as a penalty separate and distinct from the damages arising from a substantive claim. Because interest was conceived of as a penalty, it was generally presumed not to be within the contemplation of the parties to an agreement. *See Library of Congress* v. *Shaw*, 54 U.S.L.W. at 5953 & n.2. Courts therefore required that Congress separately and affirmatively consent to an award of interest and did not read an intent to permit the recovery of interest against the United States into a general waiver of immunity from suit. *See Library of Congress* v. *Shaw*, 54 U.S.L.W. at 4953. Appellants argue that even under this rigorous standard, the Federal Courts Improvement Act of 1982 effectuated a waiver of sovereign immunity against awards of post-judgment interest.

C. *Post-Judgment Interest Before the 1982 Act*

To properly evaluate appellants' argument, it is necessary to set forth at length the state of the law before the Federal Courts Improvement Act of 1982. Prior to its amendment by the Federal Courts Improvement Act, 28 U.S.C. § 1961 provided that:

> *Interest shall be allowed on any money judgment in a civil case recovered in a district court.* Execution therefore may be levied by the marshal, in any case

> where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

28 U.S.C. § 1961 (emphasis supplied). Although this section, literally read, appears to have mandated the award of interest "on *any* money judgment" in a civil case in district court, we nonetheless held that the language of section 1961 was insufficient by itself to permit an award of post-judgment interest against the United States. *See Holly* v. *Chasen*, 639 F.2d 795, 796-97 (D.C. Cir.) (per curiam), *cert. denied*, 454 U.S. 822 (1981). Our holding relied on the legislative history of the predecessor to section 1961, which demonstrated that Congress did not intend its general authorization of post-judgment interest to require the payment of such interest by the United States. *See* 639 F.2d at 797.

This court found further support for its anti-waiver interpretation in three specific statutory provisions, 28 U.S.C. § 2411, 28 U.S.C. § 2516, and 31 U.S.C. § 724a. These provisions designated certain judgments against the United States on which interest would be allowed and established both the rate of interest and the time period during which such interest would be payable. As we explained in *Holly*, "If 28 U.S.C. § 1961 is read to confer an automatic entitlement to interest at the rate provided by state law on all civil judgments against the United States, these very detailed statutory provisions will all become superfluous." 639 F.2d at 797-98.

Before turning to appellants' argument it is also necessary to lay out the fairly complicated statutory scheme governing awards of interest against the federal government incorporated in the three statutory provisions cited in *Holly* v. *Chasen*. These statutes permitted the award of interest against the federal government in *four* classes of cases: (1) Internal Revenue cases; (2) Federal

Tort Claims Act cases; (3) Tucker Act cases seeking damages of less than $10,000; and (4) Court of Claims cases. The interest rate paid by the federal government and the time period during which it was liable for interest varied dramatically depending on which of these four types of cases was involved.

The potential liability of the United States for interest was greatest in judgments rendered against it for overpayment of taxes. In such cases the United States was liable for both pre-judgment and post-judgment interest. Subsection (a) of 28 U.S.C. § 2411 provided that such interest was payable from the date of the payment or collection of the tax to a date preceding by not more than thirty days the date of the refund check. The interest rate in tax overpayment cases was the "adjusted prime rate" established by the Secretary of the Treasury under section 6621 of the Internal Revenue Code. *See* 26 U.S.C. § 6621.

An entirely different interest rate and time period governed post-judgment interest awards on judgments against the United States under the "Little Tucker Act," 28 U.S.C. § 1346(a)(2), and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2674. Subsection (b) of 28 U.S.C. § 2411 fixed the interest rate on such judgments at 4% per annum and provided that interest would run "from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment." 28 U.S.C. § 2411(b). The time period set forth in subsection (b) of 28 U.S.C. § 2411 was further limited by 31 U.S.C. § 724a. Section 724a created a permanent appropriation for satisfaction of certain judgments against the United States, including Little Tucker Act and FTCA claims. It provided in pertinent part that:

> whenever a judgment of a district court to which the provisions of section 2411(b) of Title 28 apply, is

> payable from this appropriation, *interest shall be paid* thereon only when such judgment becomes final after review on appeal or petition by the United States, and then *only from the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance* . . . .

31 U.S.C. § 724a (emphasis supplied). Courts resolved the apparent conflict between 31 U.S.C. § 724a and 28 U.S.C. § 2411(b) by holding that the time period set forth in 31 U.S.C. § 724a overrode the period contained in 28 U.S.C. § 2411(b) and thus limited the period during which the federal government would be liable for post-judgment interest. *See United States* v. *Maryland*, 349 F.2d 693, 694 (D.C. Cir. 1965); *see also Reminga* v. *United States*, 695 F.2d 1000, 1002 (6th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983); *Rooney* v. *United States*, 694 F.2d 582, 583 (9th Cir. 1982).

Prior to the Federal Courts Improvement Act of 1982, judgments against the United States in the Court of Claims were subject to yet other terms concerning post-judgment interest. 28 U.S.C. § 2516(b) provided that interest on such judgments affirmed by the Supreme Court "shall be paid at the rate of four percent per annum from the date of the filing of the transcript of the judgment in the Treasury Department to the date of the mandate of affirmance." 28 U.S.C. § 2516(b). The United States was thus liable for post-judgment interest only during the period that it appealed its adverse judgment to the Supreme Court.

In sum, prior to the Federal Courts Improvement Act of 1982, section 1961 authorized awards of post-judgment interest only against private parties. The United States was liable for interest on judgments against it only in specific instances and pursuant to different statutory provisions. Furthermore, the rate of interest and the time period during which the federal government might be obligated to pay such interest varied widely depending on the nature of the judgment against it.

D. *The 1982 Statutory Changes*

With this statutory backdrop in place, we turn now to the changes enacted by the Federal Courts Improvement Act of 1982. That Act established the United States Court of Appeals for the Federal Circuit by combining the appellate functions of the Court of Claims with the Court of Customs and Patent Appeals, and created a new United States Claims Court to handle the trial jurisdiction of the former Court of Claims. The Act also adopted certain transfer procedures to cure want of jurisdiction and provided for a nationally applicable rate of interest for calculating post-judgment interest awards.

In this appeal we are concerned only with section 302 of the Federal Courts Improvement Act. That provision accomplished three things. First, it substantially amended 28 U.S.C. § 1961, which had previously applied only to awards of post-judgment interest against private litigants. Section 1961 as amended presently provides:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
>
> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of

this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at a rate established under section 6621 of the Internal Revenue Code of 1954 [26 U.S.C. § 6621].

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit [sic], at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

28 U.S.C. § 1961. The 1982 amendments to 28 U.S.C. § 1961 incorporated the previously existing statute as subsection (a) and then added subsections (b) and (c). The amendments also substituted a nationally uniform rate for post-judgment interest in subsection (a) for the rate previously set only by reference to state law.

Section 302 of the Federal Courts Improvement Act also amended 28 U.S.C. § 2516(b) to modify the interest rate applicable to those Claims Court judgments against the United States affirmed by the Supreme Court. The 1982 amendments replaced the former 4% interest rate with the same nationally uniform rate newly set forth in 28 U.S.C. § 1961(a). Finally, section 302 of the 1982 Federal Courts Improvement Act also repealed subsection (b) of 28 U.S.C. § 2411, which had previously authorized awards of post-judgment interest against the United States in FTCA and Little Tucker Act cases, and

deleted the reference to 28 U.S.C. § 2411(b) from 31 U.S.C. § 724a, the permanent judgment appropriation statute.

II. Appellants' Arguments on Appeal

Appellants advance three independent arguments in support of their contention that these statutory changes authorize the payment of post-judgment interest on all federal district court judgments which the federal government unsuccessfully appeals. First, appellants look to the plain language of 28 U.S.C. § 1961. Second, appellants cite the legislative history as evidencing a clear congressional intent to waive sovereign immunity against post-judgment interest on all unsuccessfully appealed district court judgments. Finally, appellants contend that unless the general language of 28 U.S.C. § 1961(a) is interpreted to provide for post-judgment interest on FTCA and Tucker Act judgments, the repeal of section 2411 (b) of Title 28 of the U.S. Code will restrict the previous availability of such post-judgment interest, a clear violation of congressional intent. Ultimately, we reject all three of appellants' arguments: neither the language of 28 U.S.C. § 1961, as amended, nor its legislative history meets the stringent standards for waiver of the sovereign immunity of the United States with respect to post-judgment interest. Absent a clearly manifested congressional decision to waive the traditional "no-interest rule" in government suits, we cannot award post-judgment interest in this case. We also do not find appellants' ingenious argument based on the repeal of section 2411(b) sufficiently compelling. We simply cannot conclude that Congress meant to effect such a dramatic expansion of government liability for post-judgment interest in so subtle a manner.

A. *The Plain Language of Section 1961*

Although section 1961(a) even as amended still does not expressly refer to judgments awarded against the

federal government, appellants argue that the addition in 1982 of subsections (b) and (c) makes an interpretation of section 1961(a) which includes interest on government appeals obligatory under the plain meaning rule. We turn first to the addition of subsection (b) to section 1961. New subsection (b) provides that post-judgment interest shall be computed daily from the date of judgment to the date of payment, *except* as provided by 28 U.S.C. § 2516(b), which governs the time period for post-judgment interest paid by the United States on unsuccessful appeals to the Supreme Court from Federal Circuit decisions, and as provided by 31 U.S.C. § 1304 (b), which governs the time period for the payment of post-judgment interest when otherwise authorized by law on judgments against the United States payable out of the permanent judgment appropriation fund.[1] Under

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[1] 31 U.S.C. § 1304(b) is the present codification of the provision formerly found at 31 U.S.C. § 724a. Before the effective date of the Federal Courts Improvement Act, Congress revised and renumbered 31 U.S.C. § 724a. These revisions took effect on the same day as the Federal Courts Improvement Act. *See* Pub. L. No. 97-258, § 2(m), 96 Stat. 877, 1062 (1982). As presently drafted, 31 U.S.C. § 1304 provides in relevant part:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and *interest* and costs specified in the judgments or *otherwise authorized by law* when—
>
> (1) payment is not otherwise provided for;
>
> (2) payment is certified by the Comptroller General; and
>
> (3) the judgment, award, or settlement is payable—
>
> (A) under section 2414, 2517, 2672, or 2677 of title 28 [*i.e.*, almost all final judgments by district courts, the United States Claims Court and the Court of International Trade];
>
> (B) under section 3723 of this title;
>
> (C) under a decision of a board of contract appeals; or

these two exceptions to the daily computation of interest, post-judgment interest is payable only for the limited time period running from the filing of the transcript of the judgment with the Comptroller General to the date of the mandate of affirmance, *i.e.*, only during the period of an appeal by the federal government. Appellants argue that if section 1961(a) did not require the federal government to pay post-judgment interest, it would have

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> (D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473).
>
> (b)(1) Interest may be paid from the appropriation made by this section—
>
> (A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance; or
>
> (B) on a judgment of the Court of Appeals for the Federal Circuit or the United States Claims Court under section 2516(b) of title 28, only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance.
>
> . . . .

31 U.S.C. § 1304 (emphasis supplied).

Appellants argue that section 1304(b) permits the payment of post-judgment interest on all judgments payable from this appropriation fund. This argument ignores the clear language in section 1304(a) that restricts the payment of interest under the fund to interest "specified in the judgment[] or otherwise authorized by law." Section 1304 thus refers to statutory provisions other than itself to determine when the United States must pay post-judgment interest.

been unnecessary to create these exceptions to the daily computation of post-judgment interest in section 1961(b).

This argument overreads section 1961(b). Section 1961(b) does not state that interest *under section 1961 (a)* shall be computed daily except as provided in 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b). Section 1961 (b) does not explicitly restrict itself to payments of post-judgment interest under section 1961(a) but rather sets out the time period during which post-judgment interest runs, regardless of the statutory source of the duty to pay such interest.[2] Section 1961(b), at best ambiguous, does not support an express waiver of the sovereign immunity of the United States against awards of post-judgment interest in all unsuccessfully appealed district court judgments.[3] A court must construe waivers strictly in favor of the sovereign and may not enlarge a waiver "beyond what the language requires." *Library of Congress* v. *Shaw*, 54 U.S.L.W. at 4954 (quoting *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983)).

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[2] Various statutory sources authorizing awards of post-judgment interest include 28 U.S.C. § 1961(a), 28 U.S.C. § 2516(b), and 28 U.S.C. § 2412(f).

[3] The viability of appellants' argument, however, hinges on their ability to read section 1961(b) as an explicit exception to a generally applicable rule set out in section 1961(a). The mere existence of potentially overlapping statutory provisions governing awards of post-judgment interest will not support a general waiver of sovereign immunity under appellants' plain-meaning argument. *Cf.* Holly v. Chasen, 639 F.2d 795 (D.C. Cir.) (per curiam), *cert. denied*, 454 U.S. 822 (1981). The present provisions for the payment of post-judgment interest by the United States in tax cases, Federal Circuit cases, and on certain judgments payable out of the permanent appropriation fund would not by themselves indicate that 28 U.S.C. § 1961(a) waives sovereign immunity for post-judgment interest on all unsuccessfully appealed district court judgments.

This principle of statutory construction is mandated by section 1961 itself. Subsection (c)(4) of section 1961 explicitly announces that:

> This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

Section 1961 does not specifically authorize the award of interest on all judgments against the United States. Moreover, even if we ignored our clear obligation to resolve any ambiguities in section 1961 against the waiver of sovereign immunity, we could not adopt appellants' reading of the statute. As we shall demonstrate in Part II.B of this opinion, *infra*, the legislative history of the Federal Courts Improvement Act supplies virtually no support for appellants' interpretation of this ambiguous provision.

Appellants point next to the addition of subsection (c)(1) to section 1961 as an indication that the United States waived its sovereign immunity in section 1961(a). This second "plain meaning" argument also fails. New subsection (c)(1) of section 1961 provides that section 1961 shall not apply in any judgment of any court with respect to an internal revenue tax case. Section 1961(c)(1) sets the interest rate for such claims at the rate established under 26 U.S.C. § 6621, *i.e.*, the adjusted prime rate. Appellants argue that if new section 1961(a) did not require the payment of post-judgment interest on all district court judgments against the federal government, the exception provided in section 1961(c)(1) would be superfluous.

This argument is flawed in numerous respects: First, it ignores the fact that subsection (c)(1) is necessary to exempt private taxpayers from the interest provisions of subsection (a). Since 1975, taxpayers have been required to pay interest on underpayments of taxes at the rate specified in section 6621 of the Internal Revenue Code.

See 26 U.S.C. § 6601(a); *see also* Pub. L. No. 93-625, § 7(a)(2)(A), 88 Stat. 2108, 2115 (1975). Subsection (c)(1) is not therefore relegated to the category of "mere surplusage" if section 1961(a) does not apply to the federal government.

Appellants' argument also misreads section 1961(c)(1) as operating solely to exclude tax cases from the application of the interest rate contained in subsection (a). Section 1961(c)(1) excludes the application not only of the rate announced in subsection (a), however, but also of the timing provisions announced in subsection (b) of section 1961. Section 1961(c)(1) is further necessary to exempt tax cases from section 1961(c)(2), which provides the general terms on which the United States shall be liable for post-judgment interest on appeals which it takes from decisions in the Federal Circuit. Section 1961(c)(1) would be necessary even if there was no section 1961(a) at all. In sum, we find in section 1961(b) and section 1961(c)(1) no persuasive indication that section 1961(a) waives sovereign immunity for post-judgment interest on all judgments against the United States in district court. Appellants' reading of the statute is not necessary to avoid making either subsection superfluous.[4] We therefore cannot find in the plain meaning of section 1961 any waiver of the no-interest rule for unsuccessful appeals from all district court judgments.

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[4] Appellants' reading of the statute would also result in contradictory directives regarding the payment of post-judgment interest in patent and certain Tucker Act cases, *i.e.*, cases originally brought in district court and appealed to the Federal Circuit. *See* 28 U.S.C. § 1295(a). Under 28 U.S.C. § 1961(a) the United States would be required to pay interest for the entire period of its appeal, whereas under 28 U.S.C. § 1961(c)(2) the United States would be required to pay interest only during its unsuccessful appeal to the Supreme Court.

B. *The Legislative History of the Federal Courts Improvement Act*

An examination of the legislative history of the Federal Courts Improvement Act, moreover, indicates that any ambiguity in the language of section 1961 should be resolved against expansion of the liability of the United States for post-judgment interest. The intent of Congress in adopting this portion of the Federal Courts Improvement Act was only to set a nationally uniform rate governing post-judgment interest in all cases, except tax cases, where post-judgment interest was already available. Congress gave no indication that it intended for the first time to make such interest uniformly available against the United States. Appellants would unjustifiably escalate the modest legislative goal of a uniform rate for post-judgment interest into an unprecedentedly broad goal of universal entitlement to awards of post-judgment interest against public and private litigants alike.

The changes effected by the Federal Courts Improvement Act on which appellants rely for purposes of this appeal are found exclusively in section 302 of Title III of that Act. We shall accordingly limit our examination of the legislative history to Title III. *See* Pub. L. No. 97-164, § 302, 96 Stat. 25, 55-56 (1982). The House version of what eventually became the Federal Courts Improvement Act, H.R. 4482, contained no provision comparable to the eventual Title III. *See* H.R. 4482, 97th Cong., 1st Sess., 127 Cong. Rec. 27,785-91 (1981). The original Senate bill, S. 1700, contained detailed provisions establishing a nationally uniform interest rate on federal court judgments that was keyed to the prime interest rate. The bill also provided for the award of pre-judgment interest and made changes in the provisions governing awards of post-judgment interest against the federal government. *See* S. 1700, 97th Cong., 1st Sess. § 302, 127 Cong. Rec. 23,093-94 (1981).

Appellants' legislative history argument depends on a single clause in the original Senate bill that would have amended 28 U.S.C. § 1961 to include a provision that:

> Except [in tax cases], *interest shall be allowed on all final judgments against the United States* (including judgments of the United States Claims Court) as provided in subsections (a) [setting the rate of post-judgment interest equal to the prime interest rate] and (b) [providing for pre-judgment interest].

S. 1700, 97th Cong., 1st Sess. § 302(a)(3), 127 Cong. Rec. 23,093 (1981) (emphasis supplied). Appellants argue that this provision in the original Senate bill evidences a clear congressional intent to waive sovereign immunity which should inform our interpretation of any ambiguities in 28 U.S.C. § 1961.

This clause, however, was amended out of existence on the Senate floor by unprinted amendment 766. That amendment substituted in its stead the language presently contained in 28 U.S.C. § 1961(c)(2). That language provides:

> Except [in tax cases], *interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit*, at the rate provided in [28 U.S.C. § 1961(a)] and as provided in [28 U.S.C. § 1961(b)].

See 127 Cong. Rec. 29,865-67 (1981) (emphasis supplied). It was this amended version of S. 1700 that was considered by the House at the informal House-Senate staff conference that resolved the differences between S. 1700 and H.R. 4482, *see* 127 Cong. Rec. 29,875 (1981), and it was also this version that the House eventually passed. *See* 128 Cong. Rec. 3,562-72 (1982).

The simplest explanation for the Senate's deletion of the provision relied on by appellants is that the Senate chose not to expand the availability of post-judgment

interest against the federal government. Appellants assert, however, that the failure of either house of Congress to adopt the provision explicitly requiring the government to pay post-judgment interest in all unsuccessful appeals from district court judgments was a mere technical omission. Under this theory, the original Senate bill provision continues to be probative of the final congressional intent expressed in the Federal Courts Improvement Act. Appellants' argument misses the mark in numerous respects. In the first place, appellants have provided no theory by which we could impute to the House of Representatives the Senate's "inadvertence" in deleting its provision for the award of post-judgment interest against the United States in all unsuccessful appeals from district court judgments. The legislative history provides no indication that the House ever considered a provision similar to the Senate's. This by itself is sufficient to bar appellants' argument, as a statute must, of course, be ratified by both congressional houses.

Additionally, however, the appellants have offered no compelling evidence that the Senate acted inadvertently when it deleted its general provision for post-judgment interest against the United States. We note at the outset the highly unusual nature of what appellants are asking this court to do. When faced with a congressional amendment deleting a provision from a bill under consideration, courts typically assume that Congress knows the content of its amendment and therefore intends the deletion. In support of their argument that the deletion of the provision requiring payment of post-judgment interest by the federal government in all cases was a mere technical omission, appellants cite the debate over unprinted amendment 766. This amendment was offered by Senator Grassley in response to concerns expressed by the Office of Management and Budget (OBM). Appellants first point out that the OMB correspondence which provided the impetus for the amendment did not request

the disallowance of such post-judgment interest and that deletion of the provision was not necessary to take account of any concern actually expressed by the administration. Appellants also offer as evidence of inadvertence the fact that the sponsor of amendment 766 never disclosed to his Senate colleagues that the effect of his amendment would be to overrule the Senate bill provision awarding post-judgment interest against the government on all district court judgments.

This evidence in support of the purported technical omission is wholly insufficient to overcome the traditional rule that Congress understood the content of its amendment. Where Congress has deleted an explicit substantive provision of a bill, appellants must come up with some stronger indication of inadvertence than mere silence. This is especially true where appellants are asking this court to read a waiver of sovereign immunity back into a statute where Congress explicitly deleted that waiver. The general rule is that congressional silence does not permit a court to find the requisite waiver of sovereign immunity with respect to awards of post-judgment interest. *See Library of Congress* v. *Shaw*, 54 U.S.L.W. at 4954. Appellants' inadvertence argument perverts the traditional rule that waivers of sovereign immunity must be express and must be strictly construed. *E.g.*, *Holly* v. *Chasen*, 639 F.2d at 796-97.

The only other potential evidence of inadvertence available to appellants is one ambiguous statement by Senator Grassley. In his explanation of the present provision codified at 28 U.S.C. § 1961(c)(2) providing that the United States shall pay post-judgment interest on unsuccessful appeals to the Supreme Court from Federal Circuit judgments, Senator Grassley said:

> Thus, interest would accumulate only from the date of final judgment by the U.S. Court of Appeals for the Federal Circuit. Although *the new Claims Court would be placed in the unique position that*

> *does not apply to the judgments of the several district courts*, the amendment does retain the status quo with respect to accumulation of interest on judgments of the Court of Claims.

127 Cong. Rec. 29,865 (1981) (emphasis supplied).

This statement does not explicitly say that all district court judgments against the United States will bear post-judgment interest. Given its context, we find more plausible an interpretation of Senator Grassley's remark as a reference to the fact that some district court judgments against the United States continued to bear post-judgment interest while no Claims Court judgment did. At any rate, this single ambiguous remark cannot overcome the deadening silence surrounding the deletion of the Senate provision relied on by appellants to show that at least one branch of Congress meant to broaden the post-judgment interest coverage against the United States.

Rather than revealing a technical omission in the deletion of the general provision for post-judgment interest against the government, the legislative history actually reinforces the obvious import of the Senate's deletion of its waiver of sovereign immunity. The legislative history suggests that the never-enacted provision might itself have been a "technical omission." Although the evidence of such inadvertence in the legislative history would almost assuredly be insufficient to permit a court to set aside the obvious meaning of a statute actually passed by Congress, it need not be totally ignored when appellants ask us to set aside Senator Grassley's amendment and restore to the bill a deleted provision.

Every item in the legislative history other than the language of the deleted provision indicates that the Senate itself was unaware that its original bill would have expanded the liability of the federal government for post-judgment interest. Senator Dole's introductory

statement describes the provisions for post-judgment interest against the government as a consolidation, not as an expansion. The bill "consolidate[d] into one statute the three provisions of Title 28 of the United States Code dealing with the award of interest on judgments. Consequently the provisions of this bill for . . . a new interest rate on judgments will apply uniformly to suits between private litigants and to suits against the government." 127 Cong. Rec. 23,097 (1981) (statement of Sen. Dole). Senator Dole's introductory remarks demonstrate that a single uniform rate would apply to all awards of post-judgment interest.[5] They in no way suggest that post-judgment interest would become available against the federal government in every case in which it would be available against a private party.

The Committee Report accompanying S. 1700 similarly refers to the bill only as a consolidation of existing provisions. *See* S. Rep. No. 275, 97th Cong., 1st Sess. 12, 30 (1981).[6] Again, it is the rate rather than the availability of post-judgment interest that has been made uniform. The Senate Report, moreover, contains two significant indications that the Senate never did contemplate expanding the waiver of sovereign immunity. First, the Report contains a letter from the Congressional Budget Office estimating the expenses associated with the bill. According to this letter, "the only expenses associated with the bill will be for travel and transportation, attorney fees, and some personnel changes. These

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[5] Senator Dole's original bill would have provided that the interest rate specified in section 6621 of Title 26 (the adjusted prime rate) would apply to all awards of post-judgment interest.

[6] The Report's Section-By-Section Analysis explains that "by consolidating all the provisions for interest on judgments of Title 28 into this section, this rate becomes uniformly applicable to all litigation in the Federal courts." *See* S. Rep. No. 275, 97th Cong., 1st Sess. 30 (1981).

items are expected to total less than $70,000." S. Rep. No. 275, 97th Cong., 1st Sess. 32 (1981). The Congressional Budget Office's letter took no account of the massive increase in the government's liability for post-judgment interest which appellants would read into the bill.

The second important manifestation of the Senate's actual intention with regard to a waiver of sovereign immunity is found in a section of the Report entitled "Changes in Existing Law." In this section the Senate is usually required by its own Standing Rules to explicate all changes in existing laws made by the bill. The Judiciary Committee, however, felt justified in dispensing with this requirement because the statement contained in the House Report on H.R. 4482, the House version of S. 1700, would be "essentially the same as S. 1700." S. Rep. No. 275, 97th Cong., 1st Sess. 33 (1981). The Senate committee was able to arrive at this conclusion even though H.R. 4482 contained absolutely no provisions concerning payment of post-judgment interest by the United States or private litigants.

To sum up, we cannot view the Senate's deletion of the provision relied on by appellants as any mere technical omission to be overlooked in the face of an otherwise clear congressional intent to waive the no-interest rule in all district court judgments appealed by the United States. The technical omission theory finds no support in the legislative history. Instead, the overall legislative history, including the deletion of the provision relied on by appellants, persuades us that Congress never intended to expand its waiver of sovereign immunity but only to consolidate its already existing waivers.

C. *The Repeal of 28 U.S.C. § 2411(b)*

Appellants' final argument on appeal hinges on the repeal of 28 U.S.C. § 2411(b). Before Congress passed the Federal Courts Improvement Act, section 2411(b)

provided for the award of post-judgment interest against the United States in all actions, except tax actions, instituted under 28 U.S.C. § 1346. This meant liability for post-judgment interest primarily in FTCA cases and Little Tucker Act cases. According to the appellants, the repeal of this provision simultaneously with the amendment of 28 U.S.C. § 1961 suggests that Congress intended section 1961(a) as amended to include the award of post-judgment interest on FTCA and Tucker Act judgments against the federal government. Appellants invoke the presumption against implied repeal of remedial provisions and argue that it is extremely unlikely that Congress intended to furtively eliminate the right to receive post-judgment interest on FTCA and Tucker Act judgments, where such interest had been available for years. According to appellants, unless the general language of 28 U.S.C. § 1961(a) extends to judgments against the United States under the Tucker Act and the FTCA, which it could only do if it applied to all judgments against the United States in district court, the Federal Courts Improvement Act secretly effected an anomalous retrenchment on the availability of post-judgment interest awards against the United States.

Library of Congress v. *Shaw* forecloses this argument. We need not today decide the extent, if any, to which the Federal Courts Improvement Act curtails previously available post-judgment interest on judgments against the United States under the FTCA and the Tucker Act.[7]

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[7] We do note, however, that appellants' argument certainly overstates the extent, if any, to which the Federal Courts Improvement Act might be read to cut back on the availability of post-judgment interest. Because Little Tucker Act cases are appealed to the Federal Circuit, *see* 28 U.S.C. § 1295(a)(2), it is clear that the United States is still liable for post-judgment interest in Tucker Act cases whenever it appeals from a judgment of the Federal Circuit. *See* 28 U.S.C. § 1961(c)(2).

Even if Congress did not intend to eliminate the liability of the United States for post-judgment interest in FTCA and Tucker Act cases, this does not mean that Congress affirmatively contemplated an expansion of the liability of the United States for post-judgment interest. The waiver of immunity for an award of interest must be affirmatively and separately contemplated by Congress. *See Library of Congress* v. *Shaw*, 54 U.S.L.W. at 4953. Appellants' argument, however, rests on a waiver by implication and must therefore be rejected.[8]

CONCLUSION

After careful review of the language of 28 U.S.C. § 1961 and the legislative history of the Federal Courts Improvement Act of 1982, we find no sufficiently unambiguous waiver of sovereign immunity against the award of post-judgment interest on district court judgments unsuccessfully appealed by the United States. In so concluding we join the three other circuits that have considered the effect of 28 U.S.C. § 1961(a), although we arrive at our conclusion through somewhat different analysis. *See International Woodworkers of America, Local 3-98* v. *Donovan*, 769 F.2d 1388, 1392 (9th Cir. 1985); *Arvin* v. *United States*, 742 F.2d 1301, 1304 (11th Cir. 1984); *Knights of the Ku Klux Klan* v. *East Baton Rouge Parish School Board*, 735 F.2d 895, 902 (5th Cir. 1984). We also note that recent congressional action tends to confirm our interpretation of 28 U.S.C. § 1961(a). In 1985, Congress adopted 28 U.S.C. § 2412

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[8] Because we find that the Federal Courts Improvement Act of 1982 cannot be read as a waiver of sovereign immunity permitting awards of post-judgment interest on any unsuccessfully appealed judgment against the United States, we need not reach the additional questions raised by appellants concerning the retroactive application of the 1982 amendments to section 1961 and the proper calculation of the amount of interest which would have to be awarded thereunder.

(f) which provides for the payment of post-judgment interest when the United States appeals an award of costs or attorneys' fees awarded under the Equal Access to Justice Act. *See* Pub. L. No. 99-80, § 2(e), 99 Stat. 183, 185-86 (1985). If interest on such district court judgments had already been available under 28 U.S.C. § 1961(a), the addition of subsection (f) to 28 U.S.C. § 2412 would have been superfluous. Accordingly, for the reasons previously set forth in this opinion, the judgment of the District Court is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOROTHY M. THOMPSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 74-1101
WILLIAM J. BARRETT, JR., ACTING PUBLIC PRINTER,	)	
	)	
	)	
Defendant.	)	
	)	

ORDER

The Court has before it plaintiffs' motion for an order awarding interest on money payments in satisfaction of opposition thereto. Plaintiffs contend that statutory changes, made as a part of the Federal Court Improvements Act of 1982, Pub. L. 97-164, entitle them to post-judgment interest against the government defendant. While it is true that the amendments to 28 U.S.C. §§ 1961, 2411, and 31 U.S.C. § 1304, do modify the statutory scheme under which the United States government will be

required to pay post-judgment interest in certain specific civil cases, the Court does not find, as the plaintiffs suggest, a sweeping waiver of the government's traditional right, based on sovereign immunity, to avoid interest on judgments.

It is long been accepted by the courts that in the absence of constitutional requirements the federal courts cannot award interest upon a claim or judgment against the United States unless there has been an express waiver of sovereign immunity. United States v. N.Y. Rayon Co., 329 U.S. 654, 658-659 (1947); Knights of the Klu Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Board, ___ F.2d ___, No. 83-3292 (5th Cir. July 9, 1984); Rooney v. United States, 694 F.2d 582 (9th Cir. 1982); Holly v. Chasen, 639 F.2d 795, 796 (D.C. Cir. 1981). Such waiver must be express, it cannot arise by implication or ambiguity, and must, if found, be strictly construed. Holly, supra at 797, and cases cited therein. Recent decisions, after the Federal Courts Improvement Act, involving the issue have left this longstanding rule against post-judgement interest now before the Court

intact. Knights of the Klu Klux Klan. supra: Fidelity Construction Co. v. United States. 700 F.2d 1379. 1383 (Fed. Cir. 1983) (allowance of interest requires in explicit waiver of sovereign immunity by Congress): Hammond Co. v. United States 568 F. Supp. 309. 312 (S.D. Cal. 1983) (a statute will only be deemed to effect a waiver of sovereign immunity where the operative language is clear and unambiguous). Clemente v. United States. 568 F. Supp. 1150. 1163 (C.D. Cal. 1983) (interest is unavailable against the government in a Title VII case because of the doctrine of sovereign immunity).

The Court does not find that the amendments cited by the plaintiff are so clear. unambiguous. express or explicit to warrant the interpretation argued by the plaintiffs. To find. as the plaintiff suggests. that by these amendments Congress intended to subject the government to post-judgement interest in all civil cases would result in a far-reaching new policy. which is the domain of Congress. This conclusion the Court declines to reach. If Congress had so intended this result. it knew how to provide for it. See. e.g. 28 U.S.C. {{ 2411. 2516.

Knights of the Klu Klux Klan. supra at 4606. Therefore. this 7th day of September. 1984 it is

Ordered that plaintiff's motion for an order awarding interest on money payments in satisfaction of judgments is hereby denied.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

APPENDIX C

CURRENT LAW

(1) 28 U.S.C. { 1961 (1984)

{ 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal. in any case where. by the law of the State in which such court is held. execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment. at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of the rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31. and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at a rate established under section 6621 of the Internal Revenue Code of 1954 [26 U.S.C.A. { 6621].

(2) Except as otherwise provided in paragraph (1) of this subsection. interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit. at the rate

provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

(2) 28 U.S.C. { 2411 (1984)

{ 2411. Interest

In any judgment of any court rendered (whether against the United States. a collector or duty collector of internal revenue. a former collector or duty collector. or the personal representative in case of death) for any overpayment in respect of any internal revenue tax. interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1954 upon the amount of the overpayment from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days. such date to be determined days. such date to be determined by the Commissioner of Internal Revenue. The Commission is authorized to tender by check payment of any such judgment with interest as herein provided. at any time after such judgment becomes final. whether or not a claim for such payment has been duly filed. and such tender shall stop the running of interest. whether or not such refund check is accepted by the judgment creditor.

(3) 28 U.S.C. { 2516 (1984)

{ 2516. Interest on claims and judgments

(a) Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately before the date of the judgment.

(4) 31 U.S.C. { 1304 (1983)

{ 1304. Judgments. awards and compromise settlements

(a) Necessary amounts are appropriated to pay final judgments. awards. compromise settlements. and interest and costs specified in the judgments or otherwise authorized by law when --

(1) payment is not otherwise provided for:

(2) payment is certified by the Comptroller General: and

(3) the judgment. award. or settlement is payable--

(A) under section 2414. 2517. 2672. or 2677 of title 28:

(B) under section 3723 of this title:

(C) under a decision of a board of contract appeals: or

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10. section 715 of title 32. or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473).

(b)(1) Interest may be paid from the appropriation made by this section ---

(A) on a judgment of a district court. only when the judgment becomes final after review on appeal or petition by the United States Government. and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance: or

(B) on a judgment of the Court of Appeals for the Federal Circuit or the United States Claims Court under section 2516(b) of title 28, only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance.

(2) Interest payable under this subsection in a proceeding reviewed by the Supreme Court is not allowed after the end of the term in which the judgment is affirmed.

(c)(1) A judgment or compromise settlement against the Government shall be paid under this section and sections 2414, 2517, and 2518 of title 28 when the judgment or settlement arises out of an express or implied contract made by ---

(A) the Army and Air Force Exchange Service:

(B) the Navy Exchanges;

(C) the Marine Corps Exchanges;

(D) the Coast Guard Exchanges; or

(E) the Exchange Councils of the National Aeronautics and Space Administration.

(2) The Exchange making the contract shall reimburse the Government for the amount paid by the Government.

(5) 26 U.S.C. { 6621 (1984)

{ 6621. Determination of rate of interest

A (a) In general.--The annual rate established under this section shall be such adjusted rate as is established by the Secretary under subsection (b).

(b) Adjustment of interest rate.--

(1) Establishment of adjusted rate.--If the adjusted prime rate charged by banks (rounded to the nearest full percent)--

(A) during the 6-month period ending on September 30 of calendar year. or

(B) during the 6-month period ending on March 31 of any calendar year. differs from the interest rate in effect under the section on either such date. respectively. then the Secretary shall establish. within 15 days after the close of the applicable 6-month period. and adjusted rate of interest equal to such adjusted prime rate.

(2) Effective date of adjustment-- Any adjusted rate of interest established under paragraph (1) shall become effective---

(A) on January 1 of the succeeding year in the case of an adjustment attributable to paragraph (1)(A). and

(B) on July 1 of the same year in the case of an adjustment attributable to paragraph (1)(B).

(c) Definition of prime rate.--For purposes of subsection (b). the term "adjusted prime rate charged by banks" means the average predominant prime rate quoted by commercial banks to large businesses. as determined by the Board of Governors of the Federal Reserve System.

APPENDIX D

LAW PRIOR TO OCTOBER 1, 1982

(1) 28 U.S.C. { 1961 (1982) (amended 1982)

{ 1961. Interest

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

(2) 28 U.S.C. { 2411 (1978) (amended 1982)

{ 2411. Interest

(a) In any judgment of any court rendered (whether against the United States. a collector or deputy collector of internal revenue. a former collector or deputy collector. or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax. interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1954 upon the amount of the overpayment. from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days. such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment. with interest as herein provided. at any time after such judgment. with interest as herein provided. at any time after such judgment becomes final. whether or not a claim for such payment has been duly filed. and such tender shall stop the running of interest. whether or not such refund check is accepted by the judgment creditor.

(b) Except as otherwise provided in subsection (a) of this section. on all final judgments rendered against the United States in actions instituted under section 1346 of this title. interest shall be computed at the rate of 4 per cent per annum from the date of the judgment up to. but not exceeding. thirty days after the date of approval of any appropriation Act providing for payment of the judgment.

(3) 28 U.S.C. { 2516 (1965) (amended 1982)

{ 2516. Interest on claims and judgments

(a) Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on judgments against the United States affirmed by the Supreme Court after review on petition of the United States shall be paid at the rate of four percent per annum from the date of the filing of the transcript of the judgment in the Treasury Department to the date of the mandate of affirmance. Such interest shall not be allowed for any period after the term of the Supreme Court at which the judgment was affirmed.

(4) 31 U.S.C. { 724a (1976) (amended and codified as 31 U.S.C. { 1304. 1982)

{ 724a. Appropriations for payment of judgments and compromise settlements against United States

There are appropriated. out of any money in the Treasury not otherwise appropriated. and out of the postal revenues. respectively. such sums as may on and after July 27. 1956 be necessary for the payment. not otherwise provided for. as certified by the Comptroller General. of final judgments. awards. and compromise settlements (not in excess of $100.000. or its equivalent in foreign currencies at the time of payment. in any one case) which are payable in accordance with the terms of sections 2414. 2517. 2672. or 2677 or Title 28. together with such interest and costs as may be specified in such judgments or otherwise authorized by law: Provided. That. whenever a judgment of a district court to which the provisions of section 2411(b) of Title 28 apply. is payable from this appropriation. interest shall be paid thereon only when such judgment becomes final after review on appeal or petition by the United States. and then only from the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance (except that in cases reviewed by the Supreme Court interest shall not be allowed beyond the term of the Court at which the judgment was affirmed): Provided further. That whenever a judgment rendered by the Court of Claims is payable from this appropriation. interest payable thereon in accordance with section 2516(b) of Title 28 shall be computed from the date of the filing of the transcript thereof in the General Accounting Office: Provided further. That any judgment or compromise settlement against the United States arising out of an express of implied contract entered into by the Army and Air Force Exchange Service. Navy Exchanges. Marine Corps Exchanges. Coast Guard Exchanges. or Exchange Councils of the National Aeronautics and Space Administration. shall be paid in accordance with this section and sections 2414.

2517. and 2518 of Title 28. and such instrumentality shall reimburse the United States for a judgment or compromise settlement paid by the United States. Notwithstanding the other provisions of this section. judgments against the United States arising out of activities of the United States Postal Service shall be paid by the Postal Service out of any funds available to it.

APPENDIX E

LEGISLATIVE HISTORY

Calendar No. 385

97th CONGRESS
1st Session

S.1700

[Report No. 97-275]

To establish a United States Court of Appeals for the Federal Circuit. to establish a United States Claims Court. and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 5 (legislative day, SEPTEMBER 9), 1981
Mr. DOLE (for himself and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

NOVEMBER 18 (legislative day, NOVEMBER 2), 1981
Reported by Mr. DOLE, with amendments
[Omit the part struck through and insert the part printed in italic]

A BILL

To establish a United States Court of Appeals for the Federal Circuit, to establish a United States Claims Court, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Courts Improvement Act of 1981". May provide for free distribution of copies to members of the bar of each court and to other interested persons.

"(b) Each court of appeals shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of the court of appeals. The advisory committee shall made recommendations to the court concerning such rules and procedures. Members of the committee shall serve without compensation, but the Director may pay travel and transportation expenses in accordance with section 5703 of title 5."

(b) The section analysis of chapter 131 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"2077. Publication of rules; advisory committees."

TITLE III - JURISDICTION AND PROCEDURE
PART A -- TRANSFER OF CASES
TRANSFER TO CURE WANT OF JURISDICTION

SEC. 301.(a) Title 28. United States Code. is amended by adding the following new chapter after chapter 97:

"CHAPTER 99.--GENERAL PROVISIONS

"Sec.
"1631. Transfer to cure want of jurisdiction.
"{ 1631. **Transfer to cure want of jurisdiction**

"Whenever a civil action is filed in a court of the United States. the United States Claims Court. a court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States. or a United States bankruptcy court. and that court finds that there is a want of jurisdiction. the court shall. if it is in the interests of justice. transfer such action to any other such court in which the action could have been brought at the time such action was filed. and the action shall proceed as if it had been filed in the transferee court of the date upon which it was actually filed in the transferor court."

(b) The chapter analysis of part IV of title 28. United States Code. is amended by adding at the end thereof the following:

"99. General Provisions.....1631".

PART B -- INTEREST

INTEREST OF JUDGMENTS AND PREJUDGMENT INTEREST

SEC. 302. (a) Section 1961 of title 28. United States Code. is amended--

(1) by inserting "(a)" immediately before "Interest shall" in the first sentence:

(2) by striking out "at the rate allowed by State law" in the last sentence and inserting in lieu thereof the following:" "at the rate established pursuant to section 6621 of the Internal Revenue Code of 1954 as of that date. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges"; and

(3) by adding at the end thereof the following new subsections:

"(b)(1) Except as provided in paragraph (2) or unless otherwise required by law, in awarding damages to a party the court may add to the sum of actual damages awarded a sum of interest computed over a period before the time of judgment where the facts of the controversy and the manner in which the case was litigated indicate that an award of such prejudgment interest is appropriate to afford the prevailing party complete relief. This prejudgment interest shall be computed at the rate fixed under subsection (a) at the time of judgment and measured from the time that the party against whom damages have been awarded became aware of his potential liability or from the time that he should have become aware of such liability but, in any case, not to exceed a period of five years.

"(2) Interest under paragraph (1) shall not be awarded on losses which will not be incurred until after judgment, nor shall such interest be awarded where such an award would be duplicative of some other sum awarded.

"(c) Interest shall be computed daily to the date of payment and shall be compounded annually.

"(d)(1) In any judgment of any court rendered against the United States for any overpayment with respect to any internal revenue tax, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1954 upon the amount of overpayment, from the date of the payment or collection thereof to a date

preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

"(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States (including judgments of the United States Claims Court) as provided in subsections (a) and (b)".

(b) Sections 2411 and 2516 of title 28, United States Code, and the items relating to sections 2411 and 2516 in the section analyses of chapter 161 and chapter 165 of such title, respectively, are repealed.

(c) Section 1302 of the Act of July 27, 1956 (31 U.S.C. 724a) is amended by striking out "to which the provisions of subsection 2411(b) of title 28, United States Code apply" and by striking out "in accordance with subsection 2516(b) of title 28, United States Code".

CONGRESSIONAL RECORD -- SENATE

December 8. 1981 { 14699

Up Amendment No. 766

(Purpose: To provide a rate for interest to be calculated on judgments against the United States)

MR. GRASSLEY. Mr. President. I sent an amendment to the desk to S. 1700 respecting the interest provisions in section 302 and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will state the amendment.

The bill clerk read as follows:

The Senator from Iowa (Mr. Grassley) proposes an unprinted amendment numbered 766.

MR. GRASSLEY. Mr. President. I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDENT OFFICER. Without objection. it is so ordered.

The amendment is as follows:

On page 68. beginning with line 18. strike through line 25 on page 70. and insert in lieu thereof the following:

(2) by striking out "at the rate allowed by State law." in the last sentence and inserting in lieu thereof the following: "at a rate of interest equal to the coupon issue yield equivalent (as determined by the Bureau of Public Debt of the United Sates Department of the Treasury) of

the mean, rounded to two decimal places, of the average accepted suction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of such rates and any changes in them to all Federal Judges.": and

(3) by adding at the end thereof the following new subsections:

"(b) Interest shall be compounded daily to the date of payment except as provided in section 2516(b) of title 28, United States Code, and section 1302 of the Act of July 27, 1956 (31 U.S.C. 724a) and shall be compounded annually.

"(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at a rate established under section 6621 of the Internal Revenue Code of 1954.

"(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (9). Interest shall not be allowed on judgments of the United States Claims Court, except as otherwise provided in paragraph (1) of this subsection.

"(3) This section shall not be construed to effect the interest on any judgment of any court not specified in its section."

(b) Section 2411 of title 28, United States Code, is amended --

(1) in subsection (a) by striking out "(a)": and

(2) by repealing subsection (b).

(c) Section 1302 of the Act of July 27. 1956 (31 U.S.C. 724a). is amended by striking out "to which the provisions of subsection 2411(b) of title 28. United States Code apply."

(d) Section 2516(b) of title 28. United States Code is amended --

(1) by striking out "the rate of four percent per annum" and inserting in lieu thereof "a rate of interest equal to the coupon issue yield equivalent (as determined by the Bureau of Public Debt of the United States Department of the Treasury) of the mean. rounded to two decimal places. of the average accepted suction price a for the last auction of fifty-two week United States Treasury bills settled immediately prior to he date of the judgment"; and

(2) by striking out "in the Treasury Department" and inserting in lieu thereof "in the General Accounting Office".

MR. GRASSLEY. Mr. President. this amendment is occasioned because of strong concerns expressed by the Office of Management and Budget on behalf of the administration in the interest provisions of the committee bill. As a result. extensive discussions were held between representatives of OMB. the Judicial Conference. and Judiciary Committee staff.

An agreement was reached which has resulted in the amendment now being offered. The crux of the issue centered around the bill's provision on post-judgment interest which would be payable by the Federal Government.

This rate would be increased under the bill from 4 percent per year to a rate established under section 6621 of the Internal Revenue Code (26 U.S.C. 6621). which is currently 12 percent per year and scheduled to rise to 20 percent per year on February 1. 1982. Section 6621 establishes the rates of interest to be paid to the Federal

Government in the various situations in which taxpayers are assessed under the Internal Revenue Code.

Under that section on October 1 of each year, the Secretary of the Treasury makes a determination based on the prime rate for that day as to the interest to be applicable the following year.

On October 1, 1981 the prime rate was 20 percent. Since that time the prime rate has dropped substantially and shows every indication of further declines.

Yet taxpayers are now obliged beginning February 1, 1982, to pay the 20 percent rate. The Government also will be obliged to pay interest at the higher rate for tax refunds.

While it is not the intent at this time to amend section 6621 of the Internal Revenue Code, I understand that the administration will shortly express its concern as to this provision. The Finance Committee will then take whatever appropriate action might be justified.

It was agreed, however, that another formula would be much more workable for setting appropriate interest rates that would have the overall desirable effect of discouraging frivolous appeals in the Federal courts simply to gain the advantage of artificially low interest rates on judgments while judgments were tied up in the courts for months or even years. The new formula is pegged to the most recent sale by the Treasury Department of 1-year Treasury obligations commonly known as T-bills. These borrowings which occur frequently throughout the course of the year more accurately reflect prevailing money market conditions than the formula of section 6621 of the Internal Revenue Code.

Second, under existing structure of the U.S. Court of Claims, determination of the trial commissioners, when appealed to the full Court of Claims, do not draw interest until a final determination is made by the Court of Claims. Under the committee bill, the new U.S. CLaims

Court, which replaces the trial division of the exiting Court of Claims, would render final judgments.

These judgments would have been subject to interest unless otherwise provided for. The second change made by this amendment accomplishes that purpose.

Thus, interest would accumulate only from the date of final judgment by the U.S. Court of Appeals for the Federal Circuit. Although the new Claims Court would be place in the unique position that does not apply to the judgments of the several district courts, the amendment does retain the status quo with respect to accumulation of interest on judgments of the Court of Claims.

Third, the amendment strikes out the provisions relating to prejudgment interests. This matter was not addressed in testimony or evidence submitted to the courts subcommittee during the course of its hearings on S.1700 this year, but was a carry over from prior versions of the bill. In response to the concerns expressed by OMB and on further examination by committee staff, it seemed that this matter should be given more thorough attention before enactment into law.

Thus, the entire prejudgment interest provision has been stricken by this amendment. It is this Senator's intention that this action be done without prejudice on the merits of the issue. It consider the question in the coming months so as to be able to explore all facets of the matter and give it careful consideration prior to any further legislative activity.

Finally, Mr. President, the amendment makes other technical changes in section 302 to preclude successful litigants from unjustifiably withholding the presentation to the U.S. Treasury of final judgments and awards simply for the purpose of obtaining interest at the rate specified in the section.

Mr. President, I ask unanimous consent that two letters from Mr. Stockman to Senator Dole on this subject.

one dated December 3. 1981. and the other December 7. 1981. be printed in the Record at this point.

There being no objection. the letters were ordered to be printed in the Record. as follows:

OFFICE OF MANAGEMENT AND BUDGET
Washington. D.C.. December 3. 1981.

Hon. ROBERT DOLE.
U.S. Senate
Washington. D.C.

Dear Bob: The Administration is concerned about the effect of the post-judgment interest provisions of Section 302 of S. 1700. For the reasons set forth below. we believe that this section should not be enacted as currently drafted.

In those circumstances in which post-judgment interest would be payable by the Federal Government. the rate of interest would be increased under S.1700 from 4% per year to the rate established under 26 U.S.C. 6621 -- currently 12% per year in February. 1982. While the Federal Government would also be entitled to the higher interest upon judgments in its favor. we do not believe that the increase in receipts would balance the increase in outlays. Although no [S 14700] definitive study of the fiscal impact of the interest provisions of S. 1700 is presently available. out best estimate is that the revenue shortfall generated would be substantial. As you know. the United States always satisfies its judgments. as a matter of law. including the payment of interest following final adverse judgments. Such a record is in sharp contrast to parties against whom the United States bring suit.

The principal bases of S. 1700 to encourage parties (1) to pay adverse judgments and (2) not to take frivolous appeals. Neither of these factors is applicable to the Federal Government. which is required by law to pay adverse judgments and has been historically selective in the appeals that it takes following careful review by the

Solicitor General. We estimate that the Government appeals less than 10% of the adverse judgments issued against it. This being the case, we see no reason for penalizing the Government for what we believe to be a judicious record in appealing adverse judgments and believe it unfair to apply the proposed higher rate of interest to cases in which the Government is a defendant. At a minimum, however, we would accept as a rate of interest, in cases which the Government is defendant, the rate normally paid by the Government for Treasury bills: i.e. the cost to the Government of borrowing money.

Beyond the above, we have special problems with respect to provisions of Section 302 as they would apply to the new United States Claims Court. First, the number of judgments subject to the payment of post-judgment interest by the Government would be substantially increased by Section 302 as drafted.

Currently, in Court of Claims cases, the Government does not pay post-judgment interest during the period that the Appellant Division of the Court of Claims review adverse recommendations of the trial commissioners: the Federal Government only pays post-judgment interest when it appeals form a Court of Claims judgment to the Supreme Court and losses. Under the proposed new subsection (d)(2) of Section 1961 of Title 28, the Government would become liable for the payment of post-judgment interest whenever it appealed an adverse judgment of the new United States Claims Court to the new Court of Appeals for the Federal Circuit and failed to prevail.

We strongly believe that the status quo should be maintained by amending Section 302 to provide that interest be paid only during the pendency of unsuccessful appeals to the Supreme Court.

Secondly, the time during which interest accrues would be greatly extended under Section 302, in the United States Claims Court cases. Section 302 as presently drafted would extend the interest payment period to the date of

actual payment by the United States. extending it from the date of the mandate of affirmance of the unsuccessful appeal. the current interest cut-off date.

Under S. 1700 as presently drafted. parties holding judgments against the United States would be in a position to delay collecting their judgments if the interest applicable to judgments is greater than that which could be obtained elsewhere. The United States would thus be a money market fund of last resort for unsuccessful Claims Court Litigants.

Equity to successful claimants against the United States is more than satisfied by its ministerial payment of all claims finally determined against it. Accordingly. it is our position that S. 1700 must be modified to cut off interest payments as of the dates on which mandates of affirmance are issued. This would also conform Claims Court procedures to those in effect for District Court litigations.

In sum: superficial "even-handedness" between the United States and private parties in litigations involving money claims ultimately causes the United States to be treated unfairly. This is so given the Government's readiness to pay successful judgments on a ministerial basis and given its clear tradition of filing appeals only when substantial issues of law are at stake.

We also understand that an amendment will be offered to delete the provision authorizing assessment of pre-judgment interest. also in Section 302 of this bill. We strongly support this amendment. and believe it a necessary perfection of S. 1700.

I have instructed my staff to discuss these matters with you and your staff at your earliest convenience to the end of resolving the concerns raised in this letter. We are interested in fairness of treatment and outcome. both for taxpayers and for successful claimants. and are of course concerned about the used of the courts to effect delays in the payment of monies known to be lawfully due

and owing. I am confident that brief, intensive discussions can permit all of those concerns to be satisfactorily addressed and to permit mutually agreed upon modifications of S. 1700 as presently drafted.

Sincerely,

David A. Stockman,
Director.

OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C., December 7, 1981

Hon. Robert Dole
U.S. Senate
Washington, D.C.

Dear Bob: In my letter of December 3, 1981, I noted the Administration's concern about the effect of the post-judgment interest provisions of Section 302 of S. 1700. Since that time, our staffs have discussed the matters addressed in this letter. Following that discussion, and careful coordination with the staffs of the Administrative Office of the United States Courts and the Judicial Conference, agreement has been reached regarding modifications of Section 302.

Our agreed upon modifications are intended to provide that the rate of interest payable for post-judgment interest shall be the rate paid by the Government for one-year Treasury bills. This rate shall be applicable to all litigants, except, as noted below, those in internal revenue tax cases.

We believe this rate will satisfy the principal concerns of Section 302 in that it should be sufficiently high to discourage frivolous appeals. At the same time, the rate is not unfair to the government since it at least reflects its cost of borrowed funds.

All parties have agreed, however, that the Treasury bill rate shall not apply to any internal revenue tax case in any court. In such cases, interest shall be allowed at the rate and in the manner currently provided by law. Section 302 is not intended to modify existing law applicable to the payment of post-judgment interest in internal revenue tax cases.

Further agreed upon modifications satisfy the remaining two concerns addressed in my letter of December 3. The status quo relative to Court of Claims cases is maintained in that, except for internal revenue tax cases, interest will accrue only during the pendency of appeals (from the new Court of Appeals of the Federal Circuit) to the Supreme Court. Interest is thus not intended to accrue on appeals form judgments of the new United States Claims Court, except in internal revenue tax cases.

Finally, the agreed upon modifications are intended to cut off all interest payments on judgments against the United States as of the dates on which mandates of affirmance are issued. Similarly, Section 302 is to the effect of ensuring that interest starts to run from the date the transcript of the judgment was filed by the plaintiff with the General Accounting Office.

I understand that this letter, and my letter of December 3, 1981, are to be inserted into the Congressional Record and made a part of the legislative history relative to S. 1700.

I very much appreciate your efforts and those of your staff in working out the modifications to S. 1700, which serve as the basis of the Administration's support of the bill.

Sincerely,

David A. Stockman,
Director.

Mr. THURMOND. Mr. President. I move adoption of the amendment.

Mr. LEAHY. Mr. President. will the Senator withhold for just a moment to hear from this side of the aisle?

Mr. THURMOND. I merely moved adoption. The Senator can go ahead and say whatever he wants.

Mr. LEAHY. Mr. President. I yield 1 minute to the Senator from Maine.

Mr. MITCHELL. I think the Senator for yielding.

Mr. President. I intend to vote "present" on final passage of S. 1700. Section 207 of the reported version of S. 1700 requires the Administrative Office of the U.S. Courts to deposit funds into the civil service retirement funds for certain article III judges who resign from the bench. There are references in the committee report on the bill which suggest that this provision applies to former judges who work in any capacity or the Federal Government.

I resigned from the Federal bench to accept an appointment to this body. In order to avoid any conflict of interest or even the appearance of impropriety in voting on this bill. I intend to excuse myself from consideration of S. 1700 and will vote "present" on final passage of the legislation.

THE PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. The President. I wonder if I might ask the Senator from Iowa a couple of questions on this amendment.

This matter has been before our committee for some substantial period of time. I understand the letter

form Mr. Stockman just came within the last 3 or 4 days. Was there any reason why it was not raised at the time we had hearings on this matter of the interest rates and repealing of the old interest year?

Is there any reason why they just came around to this now rather than at a time when we with when we might have actually been able to ask questions about it during the normal hearing time?

Did the Senator from Iowa hear the question?

Mr. GRASSLEY. No. I did not.

Mr. LEAHY. Let me repeat it.

We had lengthy hearings on the matter and a great deal of discussion on this in the committee. The whole interest rate question was raised then.

Is there any particular reason why the OMB and Mr. Stockman now come up about 3 or 4 days before passage of the bill and ask to make a substantial change in it rather than doing the Judiciary Committee the courtesy of raising the point during the hearings when the sponsors of the bill might have had a chance to at least ask questions about it?

Mr. GRASSLEY. I appreciate the inquiry of the Senator from Vermont. For [S 14701] those of us who must on occasion speak for the administration. it is somewhat an embarrassment for me to say that this point was raised with the administration previously and it was not until after consideration of the legislation by the committee that the response and the necessary communications with the administration reached us. I apologize for bringing this up at this late stage. but I think that the rationale behind it is reasonable and that we ought to move forward with it. We have done it in a manner so that it is not so far out of line as to cause any particular harm.

It is related to a rate of interest that is reasonable and a yardstick which has been used on similar occasions in the past.

Mr. LEAHY. I appreciate my distinguished colleague's explanation. I have found myself in the same position on occasion. I would hope that maybe the word will get back to OMB that it would really be helpful and would really show that they at least a passing legislative interest if they let us at least have a look at these amendments in committee.

I would tell the distinguished floor manager for the majority that I have no objection to the amendment. I accept the explanation of my distinguished colleague from Iowa as to the reason for the amendment. I am willing to yield back the remainder of my time on the amendment.

Mr. SPECTER. Mr. President. I had intended to press an amendment on prejudgment interest. which I will defer out of respect for the absence of the Senator from Kansas and on the assurance of the Senator from Kansas (Mr. Dole) that there be hearings on the issue of prejudgment interest. I think ultimately we need that legislation in order to encourage settlements and to avoid having defendants delay cases in which there is no prejudgment interest.

I would also like to make a brief comment on the provisions of the bill that now give jurisdiction to the court of appeals for the Federal circuit. I call attention to the language on page 20 of the committee report that emphasizes the legislative intent against forum shopping -- where there is joinder. for example. of a patent claim with an antitrust claim in a deliberate effort to have jurisdiction vested with the court of appears for the Federal circuit. The mere joinder of a patent claim in a case whose gravamen is realistically antitrust should not be permitted in order to avoid the jurisdiction of the court of appeals for the regional circuit.

Mr. President. I ask confirmation of the distinguished chairman of the Committee on the Judiciary that this is. in fact. the legislative intent of the statute. to avoid that kind of forum shopping.

Mr. THURMOND. Mr. President. the sentiments expressed by the Senator from Pennsylvania are acceptable and the intent that he brought out in his remarks will be respected.

The PRESIDING OFFICER. Is all time yielded back?

Does the Senator from Iowa yield back the remainder of his time?

MR. GRASSLEY. I do.

The PRESIDING OFFICER. Without objection the amendment is agreed to.

The amendment (UP No. 766) was agreed upon.

The PRESIDING OFFICER. The question recurs on the amendment of the Senator from Colorado.

Mr. LEAHY. Mr. President. I ask unanimous consent that we withhold for a couple of minutes on that so that I might offer an amendment on behalf of Senator HEFLIN. a noncontroversial amendment.

The PRESIDING OFFICER. Does the Senator requests that the amendment of the Senator from Colorado be temporarily laid aside?

Mr. LEAHY. Until the disposition of the amendment I am going to offer on behalf of Senator HEFLIN.

The PRESIDING OFFICER. Is there objection? Without objection. it is so ordered.

APPENDIX F

COPIES OF RELEVANT DOCKET ENTRIES

Thompson. et al. v. McCormick (Kennickell. Jr.) Civil Action No. 74-1101

Date	Entry	Docket Page No
5/22/80	MEMORANDUM OPINION. filed 5/20/80. Richey. J.	14
5/22/80	ORDER filed 5/20/80. enjoining defts: setting forth the relief that is awarded the class: appointing U.S. Magistrate Lawrence S. Margolis a Special Master to administer all aspects of the remedial order: Exhibit A. Richey. J.	14
5/23/80	MOTION by pltfs to amend order: P&As.	14
5/20/80	SUPPLEMENTAL MOTION of pltf to amend order; P&As.	14
6/26/80	RESPONSE of deft. to pltfs. motion to amend order and pltfs supplemental motion to amend order: attachments 1 & 2.	14
7/3/80	REPLY by pltfs to deft's response to pltfs motion to amend order.	14
7/11/80	ORDER filed 7/8/80 amending the Court's order of 5/20/80. (See order for detains) Richey. J.	15

9/8/80	NOTICE of Appeal by deft. from judgment entered on 7/11/80. Gov't no fees.	16
9/9/80	NOTICE of cross-appeal by pltfs. for Judgment of 5/22/80 & 7/11/80. $70.00 paid and credited to U.S.	16
9/25/80	ORDER filed 9/24/80. denying deft's motion to amend Court order dated 7/8/80 (signed 9/13/80) RICHEY. J.	17
11/24/80	NOTICE of Appeal by deft. from order of 09/24/80. No fees Gov't	18
12/3/80	CROSS-APPEAL of pltfs. from order of 9/25/80. No fees paid see FRCP 4(a)4. Copies mailed to Elihu Leifer and Robert C. Seldon.	18
7/9/82	CERTIFIED COPY of JUDGMENT from USCA dated April 27. 1982. affirming the judgment of the USDC in part and reversed in part: remanding cases for further proceedings consistent with Opinion filed herein: Opinion.	22
11/18/82	NOTICE by deft. of filing: attachment.	22
7/5/83	ORDER filed 6/28/83 directing deft. to send proposed notice to class members within ten (10) days of the date of this order in accordance with section 3 of the stipulation: setting hearing on proposed stipulation for August 19. 1983 at 9:30 a.m. RICHEY. J.	24
7/5/83	STIPULATION filed 6/28/83 of settlement of Back and Front Pay due class members under Title VII of the Civil Rights Act for Denial of access to promotion positions: attachment: exhibit A and B. so ordered (fiat). RICHEY. J.	24

9/2/83	ORDER filed 8/31/83 directing that the stipulation of settlement between the parties pending before this Court is given final approval: rejecting objection of Sarah L. Evans. (signed 8/30/83). RICHEY. J.	25
11/28/83	ORDER filed 11/23/83 directing deft. to pay forthwith and without delay amounts due to pltf. pursuant to stipulation of settlement entered 8/31/83: directing deft. to promptly compute the amounts due for back and front pay pensions adjustments pursuant to Court's 5/20/80 order. as amended. and the stipulation of settlement RICHEY. J. (nf)	25
1/17/84	PARTIAL satisfaction of judgment by pltf.: attachment.	25
5/17/84	MOTION of pltfs. for an order awarding interest on money payments in satisfaction of judgment: memorandum: attachment.	26
7/26/84	MEMORANDUM OF POINTS AND AUTHORITIES by deft. in opposition to pltfs' motion for an order awarding interest on money payments in satisfaction of judgment: attachment.	27
8/27/84	RESPONSE of pltfs. to defts' memorandum of points and authorities in opposition to pltfs' motion for an order awarding interest on money payments in satisfaction of judgment.	28
9/10/84	ORDER (filed 9/7/84) denying pltfs' motion for an order awarding interest on money payments in satisfaction of judgment. RICHEY. J.	29

11/6/84	NOTICE OF APPEAL filed 11/5/84 by pltfs from order entered 9/7/84: $5.00 USDC fee and $65.00 USCA fee paid and credited to U.S. Treasury: copies of notice set to Robert C. Seldon. Assistant U.S. Attorney.	30
11/20/84	PRELIMINARY RECORD transmitted to USCA: USCA #84-5821.	30
4/11/86	RECORD ON APPEAL delivered to USCA. RECEIPT ACKNOWLEDGED. 5-13-86 .	32
4/11/86	SUPPLEMENTAL RECORD on appeal delivered to USCA. RECEIPT ACKNOWLEDGED. _____.	32
5/13/86	SUPPLEMENTAL RECORD ON APPEAL delivered to USCA. RECEIPT ACKNOWLEDGED. 5-13-86 .	32
5/14/86	SUPPLEMENTAL RECORD ON APPEAL delivered to USCA. RECEIPT ACKNOWLEDGED. 5-19-86 .	32
5/23/86	SUPPLEMENTAL RECORD ON APPEAL delivered to USCA. (Notice of filing by all parties) RECEIPT ACKNOWLEDGED. 5-27-86 .	32
5/30/86	SUPPLEMENTAL RECORD ON APPEAL delivered to USCA. RECEIPT ACKNOWLEDGED. 6-2-86 .	33

Supreme Court, U.S.
FILED
FEB 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-562

In the Supreme Court of the United States

OCTOBER TERM, 1986

DOROTHY M. THOMPSON, ET AL., PETITIONERS

v.

RALPH E. KENNICKELL, JR., PUBLIC PRINTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

TABLE OF AUTHORITIES

Page

Cases:

Arvin v. *United States*, 742 F.2d 1301 (11th Cir. 1984) 6

Eastern Transportation Co. v. *United States*, 272 U.S. 675 (1927) 6

International Woodworkers, Local 3-98 v. *Donovan*, 769 F.2d 1388 (9th Cir. 1985) 6

Knights of the Ku Klux Klan v. *East Baton Rouge Parish School Board*, 735 F.2d 895 (5th Cir. 1984) 6

Library of Congress v. *Shaw*, No. 85-54 (July 1, 1986) 6, 7, 9

McMahon v. *United States*, 342 U.S. 25 (1951) 6

Ruckelshaus v. *Sierra Club*, 463 U.S. 680 (1983) 6

Thompson v. *Sawyer*, 678 F.2d 257 (D.C. Cir. 1982) 1

United States v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947) 7

Statutes:

Civil Rights Act of 1964, 42 U.S.C. 2000e-2 1

Equal Pay Act of 1963, 29 U.S.C. 206(d) 1

Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 302, 96 Stat. 55-56 2

Page

Statutes—Continued:

Little Tucker Act, 28 U.S.C. 1346(a)(2) 2, 3, 5, 10
28 U.S.C. 1961 ..... 2, 3, 6
28 U.S.C. 1961(a) 1, 2, 3, 4, 5, 6, 7, 8, 10
28 U.S.C. 1961(b) 3, 4, 5, 6, 7
28 U.S.C. 1961(c) 4, 6
28 U.S.C. 1961(c)(1) 3, 5, 7, 8
28 U.S.C. 1961(c)(2) 7, 8
28 U.S.C. 2411 ..... 2, 4
28 U.S.C. 2411(b) 3, 10
28 U.S.C. 2412(f) 4
28 U.S.C. 2516 2
28 U.S.C. 2516(a) 7
28 U.S.C. 2516(b) 3, 4
31 U.S.C. (1976 ed.) 724a 2
31 U.S.C. 1304 ..... 2, 4
31 U.S.C. 1304(b) 3
31 U.S.C. 1304(b)(1) 4

Miscellaneous:

127 Cong. Rec. 29865 (1981) 9

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the United States is liable for post-judgment interest whenever it unsuccessfully appeals a money judgment rendered against it by a federal district court.

1. In 1980, petitioners were awarded front and back pay in an action against the Government Printing Office under the Equal Pay Act of 1963, 29 U.S.C. 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2. That judgment was substantially affirmed on appeal. Pet. App. 2-3. See *Thompson* v. *Sawyer*, 678 F.2d 257 (D.C. Cir. 1982).

In 1984, petitioners moved the district court for post-judgment interest on this award under 28 U.S.C. 1961(a), which provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district

court." Petitioners acknowledged that, prior to 1982, this language had not been interpreted to waive the government's sovereign immunity against awards of post-judgment interest. They contended, however, that amendments to Section 1961 that were effected by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 302, 96 Stat. 55-56, authorized awards of post-judgment interest against the United States. See Pet. App. 3. The district court rejected this argument, finding that the amendments were not "so clear, unambiguous, express or explicit [as] to warrant the interpretation argued by the [petitioners]" (*id.* at 28).

2. The court of appeals affirmed in a comprehensive opinion that reviewed both the law prior to 1982 and the changes worked by the Courts Improvement Act (Pet. App. 1-25). Prior to 1982, the court explained, Section 1961 (which made no express mention of suits against the United States) authorized awards of post-judgment interest only against private parties, to be calculated at the rate allowed by state law. Post-judgment interest was made available against the United States under three *other* statutory provisions (28 U.S.C. 2411 and 2516, and 31 U.S.C. (1976 ed.) 724a (now 31 U.S.C. 1304)) in specifically enumerated categories of cases—internal revenue cases, Federal Tort Claims Act (FTCA) cases, so-called Little Tucker Act cases (those arising under 28 U.S.C. 1346(a)(2)), and Court of Claims cases. See Pet. App. 4-7. Under these provisions, "the rate of interest and the time period during which the federal government might be obligated to pay such interest varied widely depending on the nature of the judgment against it" (*id.* at 7).

In relevant part, the court continued, the Courts Improvement Act amended Section 1961(a) to provide that post-judgment interest awarded by federal district courts would be paid at a uniform national rate, instead of at rates set by

state law.[1] The Act also added a Section 1961(b), which provides that "[i]nterest shall be computed daily to the date of payment except as provided in section 2516(b) of this title [which governs the time period for post-judgment interest in cases involving unsuccessful appeals to the Supreme Court from Federal Circuit decisions] and section 1304(b) of title 31 [which governs the time period for the payment of post-judgment interest on judgments against the United States payable out of the permanent judgment appropriation fund]." A new Section 1961(c)(1), in turn, excepted internal revenue cases from the rules set out in Sections 1961(a) and (b), providing instead that interest in such cases would be awarded at rates set out in the Internal Revenue Code. And finally, the Courts Improvement Act repealed 28 U.S.C. 2411(b), which previously had authorized awards of post-judgment interest against the government in FTCA and Little Tucker Act cases. See Pet. App. 8-10.

Having reviewed the applicable law, the court explained that the Courts Improvement Act must be read against the background of the "no-interest rule," a doctrine that consistently has been applied by this Court to mean that "[t]he waiver of [sovereign] immunity for an award of interest must be affirmatively and separately contemplated by Congress" (Pet. App. 24; see *id.* at 3-4). With this principle in mind, the court rejected petitioners' argument that the Courts Improvement Act makes the United States liable for post-judgment interest in every case in which it takes an

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[1]The language actually authorizing awards of interest—"[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court"—was identical in the pre-and post-1982 versions of Section 1961.

unsuccessful appeal from an adverse district court judgment.[2] Here, the court of appeals noted that the amended version of Section 1961(a) "does not expressly refer to judgments awarded against the federal government," and the court found unpersuasive petitioners' argument that Sections 1961(b) and (c) would be rendered nugatory unless Section 1961(a) were read to cover all district court actions to which the United States is a party. Pet. App. 10-11.

Petitioners argued that, if Section 1961(a) had not been intended to require the government to pay post-judgment interest in all cases, it would have been unnecessary for Congress, in Section 1961(b), to create exceptions (for Federal Circuit judgments and for judgments paid out of the permanent judgment appropriation fund) to Section 1961(b)'s rule requiring computation of interest to the date of payment. The court explained, however, that "Section 1961(b) does not explicitly restrict itself to payments of post-judgment interest under section 1961(a) but rather sets out the time period during which post-judgment interest runs, regardless of the statutory source of the duty to pay such interest."[3] The provision was thus "at best ambiguous," and therefore did "not support an express waiver of the sovereign immunity of the United States." Pet. App. 13.

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[2]Even under petitioners' reading of the statute, interest would be available only in cases in which the United States took an unsuccessful appeal. This follows from 31 U.S.C. 1304, which establishes the permanent judgment appropriation fund. Section 1304(b)(1) provides that "[i]nterest may be paid from the appropriation made by this section—(A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance." Petitioners acknowledge (Pet. 19) that any judgment in their favor would be paid from this fund.

[3]The court noted 28 U.S.C. 2516(b) and 2412(f) as examples of other statutes authorizing awards of post-judgment interest (Pet. App. 13 n.2).

Similarly, petitioners contended that Section 1961(c)(1), which sets out special rules for internal revenue cases, would be superfluous if Section 1961(a) did not require the payment of interest on all district court judgments against the United States. The court responded that Section 1961(c)(1) was necessary to exempt tax cases from the otherwise applicable timing provisions of Section 1961(b), whether or not Section 1961(a) were construed as petitioners argued (Pet. App. 15).

The court of appeals proceeded to reject petitioners' reliance on the Courts Improvement Act's legislative history. The "intent of Congress in adopting" the portion of the Act at issue here, the court explained, "was only to set a nationally uniform rate governing post-judgment interest in all cases, except tax cases, where post-judgment interest was already available" (Pet. App. 16). Petitioners also argued that, if their reading of Section 1961(a) is rejected, the Courts Improvement Act's repeal of Section 2411(b) would have the effect of making interest unavailable in FTCA and Little Tucker Act cases. But the court found it unnecessary to "decide the extent, if any, to which the Federal Courts Improvement Act curtails previously available post-judgment interest on judgments against the United States under the FTCA and the Tucker Act" (Pet. App. 23 (footnote omitted)), reasoning that "[e]ven if Congress did not intend to eliminate the liability of the United States for post-judgment interest in [those] cases, this does not mean that Congress affirmatively contemplated an expansion of the liability of the United States for post-judgment interest" (*id.* at 24).

3. Before this Court, petitioners repeat the arguments they made below. Because the court of appeals thoroughly examined and persuasively rejected those arguments—and because, in doing so, the court below joined the three other courts of appeals that have considered the issue in holding

that Section 1961 does not authorize awards of post-judgment interest against the United States in all cases[4]—further review is not warranted.

a. As this Court recently has explained:

> In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign, see *McMahon* v. *United States*, 342 U.S. 25, 27 (1951), and not enlarge the waiver ' "beyond what the language requires," ' *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983), quoting *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927).

Library of Congress v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 7. And even when Congress has authorized a substantive recovery against the United States, "interest cannot be recovered unless the award of interest was affirmatively and separately contemplated by Congress." Slip op. 5. This "no-interest rule provides an added gloss of strictness upon [the usual sovereign immunity] rules." *Id.* at 7.

This principle is dispositive here. Section 1961(a), of course, does not in terms make the United States liable for post-judgment interest. Petitioners' argument, instead, is that the enactment of Sections 1961(b) and (c) somehow reflects an unstated congressional intent to use Section 1961(a) as a waiver of the government's sovereign immunity. But this sort of implied waiver never is sufficient to make the United States liable for interest: " 'There can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute

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[4]See *International Woodworkers, Local 3-98* v. *Donovan*, 769 F.2d 1388, 1392 (9th Cir. 1985); *Arvin* v. *United States*, 742 F.2d 1301, 1304 (11th Cir. 1984); *Knights of the Ku Klux Klan* v. *East Baton Rouge Parish School Board*, 735 F.2d 895, 902 (5th Cir. 1984).

* * * to permit the recovery of interest suffice where the intent is not translated into affirmative statutory * * * terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.' " *Shaw*, slip op. 8 (quoting *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947)).

In any event, petitioners' argument from implication is flawed even on its own terms. In fact, as the court of appeals explained in detail, Sections 1961(b) and (c)(1) are rendered neither nugatory nor nonsensical by the court's reading of Section 1961(a). Thus petitioners contend that, unless Section 1961(a) makes the government liable for interest in all cases, there would be no need to except certain categories of government cases (those on appeal from the Federal Circuit and those paid out of the special judgment appropriation fund) from the rule governing the timing of interest payments set out in Section 1961(b) (see Pet. 16-17). The court of appeals correctly noted, however, that Section 1961(b)'s timing rule applies to interest payments authorized by *any* statute—not only those authorized by Section 1961(a) (Pet. App. 13).[5] Similarly, petitioners are incorrect in contending (Pet. 17) that Section 1961(c)(1), which excepts internal revenue cases from the rules established elsewhere in Section 1961,[6] would be superfluous unless the government were made liable by Section 1961(a). As the court of appeals

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[5]Petitioners argue (Pet. 22) that no other statutes in existence at the time of the enactment of the Courts Improvement Act authorized awards of interest. In fact, 28 U.S.C. 2516(a) allowed for payment of interest under contracts (or statutes) "expressly providing for payment thereof."

[6]Petitioners misstate the import of Section 1961(c)(1). They assert that it "provides that section 1961(a) shall not apply" to tax cases (Pet. 17). In fact, the provision states that "this section"—that is, *all* of Section 1961, including Sections 1961(b) and (c)(2)—does not apply in tax cases.

correctly explained, Section 1961(c)(1) is needed to except tax cases both from the timing rules contained in Section 1961(b) and from the rules governing appeals taken from the Federal Circuit set out in Section 1962(c)(2). As a result, "Section 1961(c)(1) would be necessary even if there was no section 1961(a) at all" (Pet. App. 15).[7] It may be added that, even apart from these more technical defects in petitioners' argument, an analysis that turns on such a convoluted and labored exegesis of Section 1961(a) hardly can provide the sort of unambiguous waiver of sovereign immunity required by this Court's decisions.[8]

b. Petitioners' reliance on the Courts Improvement Act's legislative history (Pet. 8-15) is equally without merit. Petitioners' principal argument from the history is that a proposed version of the Act would have made the United States liable for post-judgment interest in all cases (see Pet. 8)—and that Congress did not mean to change the bill's meaning when it dropped that language from the version of the Act that was enacted (see Pet. 9-15). This argument is, to say the least, farfetched. As the court of appeals noted, "[w]hen faced with a congressional amendment deleting a provision

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[7]Petitioners evidently recognize this; their only response (Pet. 23) is to suggest that Congress could have accomplished its purposes by other means. Even if that is true, petitioners' argument hardly establishes the proposition that Section 1961(c)(1) as written is superfluous.

[8]In a related vein, petitioners attempt to draw support from Section 1961(c)(2). That provision provides for post-judgment interest on "all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit" (except in tax cases). Petitioners contend that Congress should be presumed to have wanted to make the United States liable, in a parallel manner, for interest on all district court judgments as well (Pet. 18). But petitioners draw precisely the wrong conclusion from Section 1961(c)(2). The obvious contrast between Sections 1961(c)(2) and 1961(a)—the former expressly makes the United States liable, while the latter makes no mention of suits against the United States—suggests that Congress intended to *exclude* suits against the United States from the operation of Section 1961(a).

from a bill under consideration, courts typically assume that Congress knows the content of its amendment and therefore intends the deletion" (Pet. App. 18). And the court properly added: "This is especially true where [petitioners] are asking this court to read a waiver of sovereign immunity back into a statute where Congress explicitly deleted that waiver. * * * [Petitioners'] inadvertence argument perverts the traditional rule that waivers of sovereign immunity must be express and must be strictly construed." *Id.* at 19.

There are other indications as well that petitioners' analysis of the legislative history is flawed. Petitioners do not point to a single statement in any of the history expressly stating that Congress intended to make the United States liable for post-judgment interest in all cases—an intention that would have broadened the government's liability considerably.[9] To the contrary, as the court of appeals demonstrated (at Pet. App. 21-22), there is considerable evidence that Congress had no such intention. In these circumstances, petitioners have failed to make the requisite unambiguous showing that Congress intended to expand the government's liability for interest. See *Shaw*, slip op. 5.

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[9]Petitioners rely on a statement by Senator Grassley; in explaining an amendment allowing awards of interest on Claims Court judgments to run only from the date of final judgment in the Court of Appeals for the Federal Circuit, he stated that "the new Claims Court would be placed in the unique position that does not apply to the judgments of the several district courts" (Pet. 14 (quoting 127 Cong. Rec. 29865 (1981)). But as the court of appeals explained, "[t]his statement does not explicitly say that all district court judgments against the United States will bear post-judgment interest. Given its context, we find more plausible an interpretation of Senator Grassley's remark as a reference to the fact that some district court judgments against the United States continued to bear post-judgment interest while no Claims Court judgment did." Pet. App. 20.

c. Finally, petitioners argue that, unless Section 1961(a) is read to make the government liable for interest in all cases, the Courts Improvement Act's repeal of Section 2411(b) will mean that post-judgment interest no longer is available against the government in FTCA and Little Tucker Act cases (Pet. 28-30). As the court of appeals explained (at Pet. App. 23), however, that issue is not in this case, which involves neither the FTCA nor the Little Tucker Act. Moreover, even if Congress intended to preserve the liability of the United States for post-judgment interest in cases involving those statutes—presumably by substituting liability under Section 1961(a) for liability under Section 2411(b) in FTCA and Little Tucker Act cases—that would not mean that Congress, in amending Section 1961, also "affirmatively contemplated an *expansion* of the liability of the United States for post-judgment interest" (Pet. App. 24 (emphasis added)).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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